Supreme Court, U.S.
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No. 96-

In The

Supreme Court of the United States

October Term, 1996

RICHARD DODSON, ET AL.,

Petitioners,

v.

HILLCREST SECURITIES CORPORATION, INC., ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the court of appeals erred by refusing to follow this Court's edict that the 1993 amendment to Federal Rule of Appellate Procedure 3(c) "shall govern all proceedings in appellate cases thereafter commenced and, insofar as just and practicable, all proceedings then pending."

2. Whether a notice of appeal listing the first-named plaintiff followed by "et al.," and referring to the appellants as "all plaintiffs," is sufficient to confer jurisdiction on the court of appeals under pre-amendment Rule 3(c) when the case involves the district court's denial of class certification and the unnamed plaintiffs are readily ascertainable in the record.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Due to the large number of Petitioners, the list of parties to the proceeding, which includes the information required by Rule 29.6, is attached as Appendix F (p. 49a).

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PETITION FOR A WRIT OF CERTIORARI

Richard Dodson, et al., (herein "Petitioners") respectfully pray that a Writ of Certiorari issue to review the decision of the United States Court of Appeals for the Fifth Circuit entered in this case, dismissing in part, affirming in part, and reversing and remanding in part the judgment of the United States District Court for the Southern District of Texas at Houston.

OPINIONS BELOW

The opinion of the court of appeals is attached as Appendix A (p. 1a), and its denial of the petition for rehearing is attached as Appendix B (p. 37a).

JURISDICTION

The court of appeals issued its opinion on July 24, 1996. (Appendix A, p. 1a.) The court of appeals overruled Petitioners' petition for rehearing on August 23, 1996. (Appendix B, p. 37a.) The jurisdiction of this Court is invoked under 28 U.S.C. § 1254.

STATUTORY PROVISIONS INVOLVED

Rule 3(c), Federal Rules of Appellate Procedure (as amended by Order, 113 S. Ct. 819 (April 22, 1993)).

> (c) **Content of the Notice of Appeal.** – A notice of appeal must specify the party or parties taking the appeal by naming each appellant

> in either the caption or the body of the notice of appeal. An attorney representing more than one party may fulfill this requirement by describing those parties with such terms as "all plaintiffs," "the defendants," "the plaintiffs A, B, et al.," or "all defendants except X." A notice of appeal filed pro se is filed on behalf of the party signing the notice and the signer's spouse and minor children, if they are parties, unless the notice of appeal clearly indicates a contrary intent. In a class action, whether or not the class has been certified, it is sufficient for the notice to name one person qualified to bring the appeal as representative of the class. A notice of appeal also must designate the judgment, order, or part thereof appealed from, and must name the court to which the appeal is taken. An appeal will not be dismissed for informality of form or title of the notice of appeal, or for failure to name a party whose intent to appeal is otherwise clear from the notice. Form 1 in the Appendix of Forms is a suggested form for a notice of appeal.

Rule 3(c), Federal Rules of Appellate Procedure (as it existed prior to amendment by Order, 113 S. Ct. 819 (April 22, 1993)).

> (c) **Content of the Notice of Appeal.** The notice of appeal shall specify the party or parties taking the appeal; shall designate the judgment, order or part thereof appealed from; and shall name the court to which the appeal is taken. Form 1 in the Appendix of Forms is a suggested form of a notice of appeal. An appeal shall not be dismissed for informality of form or title of the notice of appeal.

Order, 113 S. Ct. 819 (April 22, 1993).

SUPREME COURT OF THE UNITED STATES

THURSDAY, APRIL 22, 1993

ORDERED:

1. That the Federal Rules of Appellate Procedure be, and they hereby are, amended by including therein amendments to Appellate Rules 3, 3.1, 4, 5.1, 6, 10, 12, 15, 25, 28, and 34, and to Forms 1, 2, and 3.

[See *infra.*, pp. ___, ___, ___.]

2. That the foregoing amendments to the Federal Rules of Appellate Procedure shall take effect on December 1, 1993, and shall govern all proceedings in appellate cases thereafter commenced and, insofar as just and practicable, all proceedings in appellate cases then pending.

3. That THE CHIEF JUSTICE be, and he hereby is, authorized to transmit to the Congress the foregoing amendments to the Federal Rules of Appellate Procedure in accordance with the provisions of Section 2072 of Title 28, United States Code.

Advisory Committee Notes regarding the 1993 amendment to Rule 3(c) (set forth in Appendix C, p. 39a).

STATEMENT OF THE CASE

This case presents the Court with a direct and knowing violation of one of its orders by the United States Court of Appeals for the Fifth Circuit. During the pendency of this appeal, the Court's 1993 amendment to Federal Rule of Appellate Procedure 3(c) became effective, relaxing the requirements for identifying the parties taking an appeal in a notice of appeal. Recognizing this Court's edict that the amendment "*shall* govern all proceedings in appellate cases thereafter commenced and, insofar as just and practicable, all proceedings then pending," Order, 113 S. Ct. 819 (April 22, 1993) (emphasis added), the Fifth Circuit nevertheless refused to apply the amended rule to the joint notice of appeal filed by "all plaintiffs" in this case and dismissed for want of jurisdiction the appeal of all Petitioners except the one specifically named in the notice of appeal. The Fifth Circuit determined, however, that a substantively identical notice of appeal was sufficient to confer jurisdiction over all of the appellants in a cause consolidated with this one on appeal. (Appendix A, p. 12a.) Petitioners contend that the Fifth Circuit made no attempt to demonstrate the injustice and impracticability of applying the amended rule, or to distinguish this appeal from the multiple cases in which the Fifth and other circuits have routinely applied amended Rule 3(c) to pending appeals. Because the Fifth Circuit conceded that the notice of appeal would be sufficient to confer jurisdiction on the appeal of all Petitioners under the amended rule, (*id.* at 5a n.4), and because in any event the notice was sufficient under the text of former Rule 3(c), Petitioners have been erroneously and unjustly deprived of their right to appeal.

A. Factual Background and Proceedings in the District Court

Petitioners are hundreds of investors who participated in the trading of government securities arranged by Hillcrest Securities Corp., Inc. and Hillcrest Equities Inc. (collectively, "Hillcrest"). The Respondents, Grant Thornton, L.L.P., Pannell, Kerr & Forster, and Branch, Orcutt, Kirkpatrick & Criswell, are accounting firms that audited Hillcrest ostensibly to verify the authenticity of the trades – trades that the Internal Revenue Service ("IRS") later claimed were never made. Petitioners contend that Hillcrest fraudulently misrepresented the existence of the transactions. They also claim that the accounting firms actively solicited and marketed these securities and early became aware of the fraudulent nature of the trades but failed to disclose the fraud to Petitioners.

On May 10, 1984, an article about a Wall Street trader, Ed Markowitz, appeared in the *Wall Street Journal*. Robert E. Taylor, *U.S. Securities Trader to Admit Tax-Fraud Guilt*, Wall St. J., May 10, 1984, at 6. The article disclosed an IRS investigation concerning "a string of companies and partnerships" run by Markowitz, trades in government securities that were allegedly not made, and a lawsuit alleging that Markowitz had cheated his partners. Near the end of a lengthy account, the article reported:

> Hillcrest Securities of Dallas traded with Mr. Markowitz in securities valued at more than $1 billion, according to its attorney, Lawrence Ross. But according to Mr. Ross, a major accounting firm has audited a sampling of those trades and found they were documented. He said Hillcrest

> currently hasn't any open positions with Mr. Markowitz.

Id.

Over two years later, in the summer of 1986, the IRS began assessing tax deficiencies against Hillcrest investors on the basis that they had taken tax deductions for trades that were never made. Investors who flocked to the tax court to dispute these contentions were represented by the Hillcrest Legal Defense Fund ("the Fund") and its designated lawyer, Larry Ross. As late as February 1988, Ross assured his clients that Markowitz was lying, that with respect to the Hillcrest investments actual trades had been made, and that the authenticity of these trades had been documented by Hillcrest's accounting firms.

On May 11, 1988, several investors sued Hillcrest, Respondents, and others in the United States District Court for the Southern District of Texas at Houston. The plaintiffs alleged violations of the Securities Exchange Act of 1934, 15 U.S.C. § 78a *et seq.*, the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1961 *et seq.*, and the Texas Deceptive Trade Practices and Consumer Protection Act ("DTPA"), Tex. Bus. & Com. Code § 17.46 *et seq.* ("the *Dodson* suit"). The *Dodson* suit also included Texas common law claims for fraud, negligence, and breach of fiduciary duty. The original plaintiffs in the *Dodson* suit sought the certification of a class comprised of all investors in the Hillcrest government securities program. Following the district court's denial of their motion for certification, the complaint was

amended and supplemented to add several hundred more individual plaintiffs.

In an interlocutory judgment entered on February 13, 1990, the district court held Hillcrest liable for actual damages. The district court abated determination of the amount of damages pending resolution of plaintiffs' claims against the remaining defendants.

Discovery proceeded throughout 1990 and 1991. On April 1, 1992, the district court dismissed many of the *Dodson* plaintiffs for alleged discovery abuse and, on motions for summary judgment filed by two defendants, dismissed the rest of the plaintiffs on statute of limitations grounds. Two days later, the court granted the third defendant's summary judgment motion. The *Dodson* plaintiffs filed a timely notice of appeal on April 29, 1992, and an amended notice on August 17, 1992. (Appendix D, p. 41a.) The notice stated that "all plaintiffs" appeal. (*Id.*)

Meanwhile, a second action involving several dozen Hillcrest investors had been filed on June 11, 1990 ("the *Lacy* suit"). The district court dismissed the *Lacy* suit on April 23, 1992 on the same statute of limitations grounds as it had dismissed the *Dodson* suit. The *Lacy* plaintiffs also filed a timely notice of appeal on May 4, 1992, and an amended notice on July 10, 1992. (Appendix E, p. 45a.) The notice similarly stated that "all plaintiffs" appeal. (*Id.*)

B. Legal Background

For a court of appeals to take jurisdiction over an appeal, an appellant must comply with Federal Rule of

Appellate Procedure 3(c). *Torres v. Oakland Scavenger Co.*, 487 U.S. 312, 317 (1988). Both before and after the amendment of the Rule by this Court in 1993, the Rule required that "[a] notice of appeal must specify the party or parties taking the appeal." Fed. R. App. P. 3(c), *infra*, at pp. 1-2. The 1993 amendment added, *inter alia*, the following language: "An attorney representing more than one party may fulfill this requirement by describing those parties with such terms as 'all plaintiffs,' 'the defendants,' 'the plaintiffs A, B, et al.,' or 'all defendants except X.' " Fed. R. App. P. 3(c) (as amended by Order, 113 S. Ct. 819 (April 23, 1993)).

Prior to the 1993 amendment, the circuits were split regarding whether "all plaintiffs," "defendants," or similar language satisfied the rule's specificity requirement. *Compare Adkins v. United Mine Workers of Am.*, 941 F.2d 392, 397 (6th Cir. 1991) (holding that the phrase "all of the plaintiffs" satisfied the Rule), *cert. denied*, 502 U.S. 1098 (1992) *and National Ctr. for Immigrants' Rights, Inc. v. INS*, 892 F.2d 814, 816 (9th Cir. 1989) (holding that identifying appellants only as "Defendants" was sufficient) *with Santos-Martinez v. Soto-Santiago*, 863 F.2d 174, 175-76 (1st Cir. 1988) (holding that "all plaintiffs" was insufficient) *and General Elec. Co. v. Lehren*, 974 F.2d 66, 67 (8th Cir. 1992) (holding that referring to parties to appeal as "Defendants" failed to satisfy the Rule).

The split among the circuits largely resulted from confusion about this Court's holding in *Torres v. Oakland Scavenger Co.*, 487 U.S. 312 (1988). *See* Fed. R. App. P. 3 advisory committee's note to subdivision (c) (Appendix C, p. 40a). In *Torres*, this Court held that "[t]he purpose of the specificity requirement of Rule 3(c) is to provide

notice both to the opposition and to the court of the identity of the appellant or appellants." 487 U.S. at 318. "The use of the phrase 'et al.,' " the Court concluded, "utterly fails to provide such notice." *Id.* The Court held that the Rule is satisfied only by a designation that gives fair notice of exactly which parties seek to appeal. *Id.*

The purpose of the 1993 amendment to Rule 3(c) was to quell the excessive litigation that *Torres* spawned. *See* Fed. R. App. P. 3 advisory committee's note to subdivision (c) (Appendix C, p. 40a). To expedite the amendment's beneficial effect upon appellants, this Court mandated that, "insofar as just and practicable," the amendment should govern all proceedings pending at the time it took effect. Order, 113 S. Ct. 819 (April 22, 1993). Since the amendment has taken effect, courts of appeals, including the Fifth Circuit, have responded to the Court's edict by applying the new rule to pending cases.[1]

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[1] *See, e.g., Barbour v. Merrill*, 48 F.3d 1270, 1275-76 (D.C. Cir. 1995), *cert. dism'd*, 116 S. Ct. 1037 (1996); *Frey v. City of Herculaneum*, 44 F.3d 667, 670 n.1 (8th Cir. 1995); *Ford v. Elsbury*, 32 F.3d 931, 933-34 (5th Cir. 1994); *Cole v. Ruidoso Mun. Schs.*, 43 F.3d 1373, 1385-86 (10th Cir. 1994); *Cleveland v. Porca Co.*, 38 F.3d 289, 294 (7th Cir. 1994); *Dodger's Bar & Grill, Inc. v. Johnson County Bd. of County Comm'rs*, 32 F.3d 1436, 1440-41 (10th Cir. 1994); *Garcia v. Wash*, 20 F.3d 608, 609 (5th Cir. 1994); *see also Ortaliza v. General Mills, Inc.*, 56 F.3d 72, 1995 WL 316927, at *2-3 (9th Cir. May 24, 1995), *cert. denied*, 116 S. Ct. 518 (1995); *Chavez v. City of Lynnwood*, 42 F.3d 1398, 1994 WL 659012, at *3 (9th Cir. Nov. 22, 1994); *Gerber v. Gariepy*, 28 F.3d 1213, 1994 WL 362101, at *2 (6th Cir. July 12, 1994); *Hoefler v. Caesar's Tahoe, IATSE Union Local No. 363*, 15 F.3d 1085, 1994 WL 28354, at *1-2 (9th Cir. Jan. 31, 1994). The only other case Petitioners have found expressly refusing to apply the amended rule did so without reference to the "just and practicable" determination and was

C. Proceedings in the Court of Appeals

After notices of appeal had been filed in both cases, the *Dodson* and *Lacy* suits were consolidated by the Fifth Circuit. Respondents filed a motion to dismiss both appeals for want of jurisdiction, and the court ordered that the motion be carried with the appeal. The court took up the sufficiency of the two notices of appeal as a threshold issue in its July 24, 1996 opinion. (Appendix A., p. 5a.)

As the Fifth Circuit acknowledged, the notices in the two cases were identical. (*Id.* at 12a.) The *Dodson* notice was captioned "Richard Dodson, et al.," (Appendix D, p. 41a), and the *Lacy* notice "William M. and Lucille C. Lacy, et al." (Appendix E, p. 45a.) The text of both notices state that "all plaintiffs" appear, though no other parties are identified by name. (Appendix D, p. 41a; Appendix E, p. 45a.) Both notices were filed prior to the promulgation of

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later vacated by the same panel of that Court, which proceeded to address the merits of the appellants' claims. *See Brooks v. Celeste*, 16 F.3d 104, 108 (6th Cir.) (noting simply that the "rule was not in effect when the notice of appeal was filed in this case nor when the case was submitted for decision"), *vac'd*, 39 F.3d 125 (6th Cir. 1994) (merely stating that it vacated its prior decision dismissing the appeal for lack of jurisdiction due to plaintiffs' defective notice of appeal). In two other cases, the courts simply declined to consider the applicability of the amended rule at all. *See Gochis v. Allstate Ins. Co.*, 16 F.3d 12, 13 n.3 (1st Cir. 1994) ("[S]ince neither party has raised the applicability of the revised rule, we have not considered the amendment in this appeal."); *A. Michael's Piano, Inc. v. Federal Trade Comm'n*, 18 F.3d 138 (2d Cir.) (argued before effective date of amended rule; amended rule not mentioned), *cert. denied*, 115 S. Ct. 574 (1994).

the 1993 amendment to Rule 3(c), (Appendix D, p. 41a; Appendix E., p. 45a), and both appeals were pending when the amendment took effect on December 1, 1993. (Appendix A, p. 5a n.4.) The Fifth Circuit held the *Lacy* notice to be effective for all of the plaintiffs in that case, but concluded that the *Dodson* notice was only effective for Mr. Dodson.

Despite the importance of this issue to Petitioners and their right to appeal, the Fifth Circuit relegated to a footnote its determination of the amendment's application to this case. (*Id.*) Noting first that the sufficiency of the *Lacy* notice under the old version of the Rule precluded any need to consider the new Rule's application to that case, the court moved on to *Dodson*. (*Id.*)

The court first noted its earlier decision to carry the motion to dismiss with the appeal, and the fact that on January 4, 1993, a bankruptcy filing by one of the Respondents caused an automatic stay of the appeal. (*Id.*) Because Rule 3(c)'s amendment became effective during the stay period, the court announced, the old Rule "unquestionably would have applied" were it not for the carrying of the motion to dismiss or the intervention of the bankruptcy filing of one of the Respondents. (*Id.*) Therefore, the court held, because it was "merely fortuitous" that the *Dodson* appeal had taken so long to be considered, it would not be "just and practicable" to apply the amended Rule 3(c). (*Id.*) The court added that the "uncertainty . . . about who was appealing" also supported the decision. (*Id.*)

The court went on to determine the sufficiency of the two notices under the old Rule 3(c). (*Id.* at 5a - 12a.) The

Lacy notice satisfied the specificity requirement, the court held, because the textual designation "all plaintiffs" "leaves no room for doubt about who is appealing." (*Id.* at 12a.)

Despite the uniform use of the phrase "all plaintiffs" in both notices, the court determined that the *Dodson* notice was insufficient under the old Rule. (*Id.* at 11a.) In the *Dodson* case, the court held it was "almost impossible to tell to whom that phrase applie[d]." (*Id.* at 9a.) According to the Fifth Circuit, the litigation was too complex, and too many plaintiffs were entering and leaving the lawsuit, for any certainty to exist about to whom "all plaintiffs" referred. (*Id.* at 9a-11a.) Therefore, the court held, only the sole named plaintiff, Richard M. Dodson, had invoked its jurisdiction. (*Id.* at 11a.) The rest of the Petitioners were dismissed. (*Id.*)

Turning to the merits, the Fifth Circuit affirmed the district court's denial of class certification in the *Dodson* suit, (*id.* at 16a), reversed the limitations dismissal of Dodson's RICO, federal securities fraud, and Texas common law fraud claims against two of the defendants, (*id.* at 36a), and affirmed the limitations dismissal of all of Dodson's other claims. (*Id.* at 35a, 36a.) In the *Lacy* suit, the court affirmed the limitations dismissal of the state law claims other than fraud, (*id.* at 36a), and reversed the dismissal of the RICO, federal securities, and Texas common law fraud claims. (*Id.*) The claims that had been erroneously dismissed were remanded to the district court. (*Id.*)

D. Basis for Federal Jurisdiction in the Court of First Instance

By suing for violations of the Securities Exchange Act of 1934, 15 U.S.C. § 78a *et seq.*, and the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961 *et seq.*, Petitioners invoked the federal question jurisdiction of the United States District Court. 28 U.S.C. § 1331. Petitioners' claims under Texas law fall within the district court's supplemental jurisdiction. 28 U.S.C. § 1367.

REASONS FOR GRANTING THE PETITION

This Court ordered on April 22, 1993 that "insofar as just and practicable," the amended version of Federal Rule 3(c) "shall govern all proceedings in appellate cases . . . then pending." Order, 113 S. Ct. 819 (April 22, 1993). In direct contravention of this dictate, the United States Court of Appeals for the Fifth Circuit refused to apply the amended rule in this case. The Fifth Circuit's decision has far-reaching implications in all manner of cases involving the application of amended rules to pending cases and this Court's frequent admonition to apply amended rules to pending appeals where "just and practicable." This Court should grant the petition in this case in order to ensure uniform observance of its direct mandates by the courts of appeals, and to prevent the unfairness resulting to appellants from courts' deliberate failure to follow those mandates in the context of amended rules of procedure.

Furthermore, the Fifth Circuit's determination that the notice of appeal in this case did not satisfy the pre-amendment version of Rule 3(c) also deserves review by

this Court. Like its holding on the applicability of amended Rule 3(c) to pending cases, the Fifth Circuit's decision concerning sufficiency of the notice under old Rule 3(c) conflicts with other Fifth Circuit precedent as well as decisions in the other courts of appeal.

The importance of a uniform interpretation of Rule 3(c) has already been highlighted by the Court's opinions in *Smith v. Barry*, 502 U.S. 244 (1992), *Torres v. Oakland Scavenger Co.*, 487 U.S. 312 (1988), and *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56 (1982) (per curiam). In each of the Court's previous cases concerning Rule 3(c), a conflict among the circuits induced the Court to grant certiorari. *Smith*, 502 U.S. at 247; *Torres*, 487 U.S. at 314; *Griggs*, 459 U.S. at 58. Likewise, the divergence of opinion among circuits regarding the issues in this case requires the Court's guidance once again.

I. THE DECISION OF THE FIFTH CIRCUIT EFFECTIVELY DISREGARDS THIS COURT'S EDICT CONCERNING APPLICATION OF THE AMENDED RULE TO PENDING CASES, AND CONFLICTS WITH DECISIONS OF THE FIFTH AND OTHER CIRCUITS IN WHICH THE RULE HAS BEEN APPLIED TO PENDING CASES.

In a footnote, the Fifth Circuit refused to apply the amended version of Federal Rule of Appellate Procedure 3(c) to this appeal, which was pending on the effective date of the Rule's amendment, December 1, 1993. (Appendix A, p. 5a n.4.) Cognizant of this Court's edict that the 1993 amendments "*shall* govern all proceedings in appellate cases thereafter commenced and, insofar as just and practicable, all proceedings then pending,"

Order, 113 S. Ct. 819 (April 22, 1993) (emphasis added), the Fifth Circuit nevertheless determined that "[b]ecause it [was] merely fortuitous that the *Dodson* appeal [took] such a long time to be considered," it would not have been "just and practicable" to apply the amended rule. (*Id.*) The Fifth Circuit moreover conceded that the notices of appeal filed in both *Dodson* and *Lacy* are sufficient to confer appellate jurisdiction under the current version of the Rule. (*Id.*) The Fifth Circuit, however, made no effort to follow this Court's directive to apply amended Rule 3(c) "where just and practicable," but rather seized upon the "fortuitousness" of the appeal's pendency as an easy means of quickly disposing of the majority of Petitioners' appeal, thereby avoiding the more complex issues of substantive law involved in this appeal. As demonstrated below, the court's off-hand dismissal of the applicability of the amended Rule does not withstand close scrutiny.

A. The "Fortuitousness" of This Appeal's Pendency on the Effective Date of the Amended Rule Is Wholly Irrelevant to the "Just and Practicable" Determination.

The "fortuitousness" of this appeal's pendency, standing alone, simply cannot render application of the amended rule unjust or impracticable. The pendency of any case or any appeal at a given point in time is fortuitous. Yet the fortuitousness of the appeal is the only basis upon which the Fifth Circuit declined to apply the Rule. Because the prolonged pendency of this appeal was not caused or even contributed to by Petitioners, applying the amended Rule is not unjust in the sense of giving

Petitioners an undeserved windfall. Application of the amended Rule is also not unjust or impracticable in the sense of harming or prejudicing Respondents in their appeal. Because the Fifth Circuit disposed of the notice of appeal issue only upon submission of the entire appeal, the parties have already fully briefed and argued all the issues in this appeal, and the entire case stands ready for disposition on the merits should this Court remand this case to the Fifth Circuit. *Cf. Frey v. City of Herculaneum*, 44 F.3d 667, 670 n.1 (8th Cir. 1995) (after initially finding the notice of appeal deficient as to several parties under pre-amendment Rule 3(c), applying amended Rule 3(c) *on rehearing* to take jurisdiction of the appeal by all parties). Indeed, Dodson and the *Lacy* plaintiffs have been remanded to the district court where the merits of their remaining claims will be addressed. (Appendix A, p. 36a.) Because Respondents must face the issues presented by this case regardless of the presence of Petitioners, it is nonsensical to argue that they would suffer any harm or prejudice from the application of amended Rule 3(c).

Notably, neither the Fifth Circuit's opinion nor the statement of jurisdiction filed by Respondents contains any evidence of actual prejudice or harm that defendants will suffer by the application of the amended rule to this case. *See Ford v. Elsbury*, 32 F.3d 931, 934 (5th Cir. 1994) (applying amended Rule 3(c) where "Appellees have not shown that applying the amended Rule would operate as an unfair surprise to them or otherwise be unjust"); *Cleveland v. Porca Co.*, 38 F.3d 289, 294 (7th Cir. 1994) (applying amended Rule 3(c) because the "defendants will suffer no prejudice or injustice by this appeal going forward"); *Dodger's Bar & Grill, Inc. v. Johnson County Bd. of County*

Comm'rs, 32 F.3d 1436, 1440 (10th Cir. 1994) (applying amended Rule 3(c) where "Defendants will suffer no prejudice or injustice by the participation of the individual plaintiffs in this appeal"); *see also Burt v. Ware*, 14 F.3d 256, 260 (5th Cir. 1994) (applying the 1993 amendment to Fed. R. App. P. 4(a)(4) where the "appellees will not be prejudiced by employment of the new rules; rather, they will simply lose a potential 'windfall' of having the appeal dismissed").[2]

Moreover, the mere fortuitousness of this appeal's pendency does not distinguish this appeal from any case in which a court has applied amended Rule 3(c) to a pending appeal, because the fact that *any* particular appeal was pending when amended Rule 3(c) became effective can be characterized as "fortuitous." The granting of extensions of time to file briefs, whether oral argument is requested, and the current status of the appellate court's oral argument calendar are just some of

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[2] In a later portion of its opinion discussing the sufficiency of Petitioners' notice of appeal under pre-amendment Rule 3(c), the Fifth Circuit states that "[t]here is certainly doubt about which *Dodson* plaintiffs – other than Dodson himself – could be held liable for costs or sanctions." (Appendix A, p. 11a (citing *Torres v. Oakland Scavenger Co.*, 487 U.S. 312, 318 (1988)).) *Torres*, however, used this concern to justify its holding that "et al." was an insufficient designation; such a concern is arguably no longer relevant under the amended rule, which expressly permits use of the term "et al." Fed. R. App. P. 3(c). Moreover, any such doubt cannot serve as the basis for refusing to apply the amended rule, as it would prohibit application of the rule to pending appeals of large, uncertified class actions *per se*. *See Ford v. Elsbury*, 32 F.3d 931, 933-34 (5th Cir. 1994) (applying amended rule to pending appeal of large, uncertified class action).

the factors that can affect the length of time a case is pending before a court of appeals and thus result in a case's pending before that court on the amendment's effective date. Petitioners have not been able to locate any other case relying on such a rationale to refuse to apply amended Rule 3(c), and the Fifth Circuit's opinion is inconsistent with every case applying amended Rule 3(c) to pending cases, to the extent that they all involve appeals fortuitously pending on December 1, 1993.[3] For example, in *Cole v. Ruidoso Municipal Schools*, a case that had been pending for over two years because a final judgment had not been entered below, the Tenth Circuit did not hesitate to apply the amended rule. 43 F.3d 1373, 1378, 1385-86 (10th Cir. 1994) (in opinion issued December 29, 1994, applying amended Rule 3(c) to take jurisdiction of notice of appeal filed on September 24, 1992). The fact that the primary factor relied upon by the court to avoid applying amended Rule 3(c) was present in *every* case which has applied the amended Rule shows that it is

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[3] *See, e.g., Barbour v. Merrill*, 48 F.3d 1270, 1275-76 (D.C. Cir. 1995), *cert. dism'd*, 116 S. Ct. 1037 (1996); *Frey v. City of Herculaneum*, 44 F.3d 667, 670 n.1 (8th Cir. 1995); *Cole v. Ruidoso Mun. Schs.*, 43 F.3d 1373, 1385-86 (10th Cir. 1994); *Cleveland v. Porca Co.*, 38 F.3d 289, 294 (7th Cir. 1994); *Dodger's Bar & Grill, Inc. v. Johnson County Bd. of County Comm'rs*, 32 F.3d 1436, 1440-41 (10th Cir. 1994); *Ford v. Elsbury*, 32 F.3d 931, 933-34 (5th Cir. 1994); *Garcia v. Wash*, 20 F.3d 608, 609 (5th Cir. 1994); *see also Ortaliza v. General Mills, Inc.*, 56 F.3d 72, 1995 WL 316927, at *2-3 (9th Cir. May 24, 1995), *cert. denied*, 116 S. Ct. 518 (1995); *Chavez v. City of Lynnwood*, 42 F.3d 1398, 1994 WL 659012, at *3 (9th Cir. Nov. 22, 1994); *Gerber v. Gariepy*, 28 F.3d 1213, 1994 WL 362101, at *2 (6th Cir. July 12, 1994); *Hoefler v. Caesar's Tahoe, IATSE Union Local No. 363*, 15 F.3d 1085, 1994 WL 28354, at *1-2 (9th Cir. Jan. 31, 1994).

plainly an inadequate basis upon which to deprive the Petitioners of their right to appeal.[4]

On a wider scale, the Court should grant this petition as a means of providing direction on the correct application of Rule 3(c). Even among those circuits that, unlike the Fifth Circuit in this case, have applied the amended rule to pending cases, several have construed the rule too narrowly.[5] This Court should grant certiorari to resolve a

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[4] Not only is the Fifth Circuit's opinion inconsistent with *all* cases applying the amended rule to pending appeals, to the extent those cases were all "fortuitously" pending on the amendment's effective date, it is in particular and direct conflict with a recent case from the same circuit, *Ford v. Elsbury*, 32 F.3d 931 (5th Cir. 1994). In *Ford*, the Fifth Circuit applied the amended rule to an appeal of a large, uncertified class action, as here. 32 F.3d at 933-34. The caption of the notice of appeal referred to "Undray D. Ford, et al.," and the body referred to the "'Ford' plaintiffs." *Id.* at 933. Similarly, the caption of the notice of appeal filed in *Dodson* referred to "Richard Dodson, et al.," and the body referred to "all plaintiffs." (Appendix D, p. 41a.) The *Ford* court's determination that applying the amended rule would not be unjust to the appellees was based in part on the fact that the plaintiffs had been referred to as "the Ford plaintiffs" in the district court. *Ford*, 32 F.3d at 934. Similarly, Petitioners were consistently referred to below as "plaintiffs" or as "Richard Dodson, et al.," even by Respondents. *See also* Fed. R. App. P. 3 advisory committee's note to subdivision 3(c) (stating that the purpose of the amendment was "to prevent the loss of a right to appeal through . . . continued use of such terms as 'et al.,' which are sufficient in all district court filings after the complaint").

[5] Several circuits have held that even under the amended rule, the notices of appeal at issue failed to perfect the appeal for some would-be appellants. Invariably, these circuits have continued to rely heavily upon *Torres*. *See, e.g., Murphy v. Keystone Steel & Wire Co.*, 61 F.3d 560, 570 (7th Cir. 1995) (notice

confusing area of appellate jurisdiction, to provide consistent direction on the meaning of both amended Rule 3(c) and the term "just and practicable," and to enforce its orders.

Moreover, this issue is of great importance to the hundreds of Petitioners whose right to a review on the merits has been denied. Indeed, the denial of these Petitioners' right to review is especially harsh, since the Fifth Circuit has expressly ruled that the district court's summary judgment on several of Dodson's claims, which was the same as the summary judgment rendered on Petitioners' same claims, was erroneous. The arbitrariness and unfairness to Petitioners of the court's holding are further highlighted by the fact that the court chose to preserve the appellate rights of the *Lacy* plaintiffs, who possess identical claims and filed an identical notice of appeal to Petitioners. Because the appellate rules were amended in order "to liberalize the pleading requirements for a notice of appeal," *Ford*, 32 F.3d at 934, and thus to preserve appellants' right to review, the Fifth

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of appeal naming only the representative of a certified class failed to perfect appeal as to the entire class); *Fleming v. Asbill*, 42 F.3d 886, 888 n. 3 (4th Cir. 1994) (notice of appeal naming a plaintiff in the caption, but not in the text, failed to perfect appeal); *see also United States v. Outlaws Club*, 94 F.3d 643, 1996 WL 467646, at *1 & n. 3 (4th Cir. Aug. 19, 1996) (per curiam) (in an *in rem* proceeding, notice that referred only to the subject property failed to perfect owner's appeal); *Dietrich v. Sun Exploration & Prod. Co.*, 21 F.3d 427, 1994 WL 108961, at *10 (6th Cir. Mar. 30, 1994), *cert. denied*, 115 S. Ct. 197 (1994) (where both plaintiffs and their counsel were assessed Rule 11 sanctions but notice referred only to plaintiffs, counsel's appeal was not perfected).

Circuit's opinion denying that right as to hundreds of plaintiffs deserves review by this Court.

B. Confusion Regarding the Identity of All Appellants Does Not Exist in This Case, and in Any Event Would Not Be Grounds for Refusing to Apply the Amended Rule.

The Fifth Circuit's opinion relies on some "confusion" surrounding the identity of the appealing plaintiffs in this case to buttress its conclusion that the amended Rule should not be applied to this appeal. (Appendix A, p. 11a.) As the Fifth Circuit concedes, however, the *Dodson* notice of appeal is clearly sufficient under amended Rule 3(c) whether or not such confusion exists. As the comments to the 1993 amendments recognize, it is very often the case in large, uncertified class action appeals that it is impossible to name all plaintiffs, including putative class members. *See* Fed. R. App. P. 3 advisory committee's note to subdivision (c) ("If no class has been certified, naming each of the putative class members as an appellant would often be *impossible.*") (Appendix C, p. 40a) (emphasis added). The Fifth Circuit's opinion errs in accepting the argument that application of the amended rule to large, uncertified class action appeals is unfair because it is too confusing to the appellees. Whatever the merits of such a fairness argument, it was implicitly rejected by this Court and Congress when they respectively transmitted and approved the amendment to Rule 3(c) deeming sufficient a notice of appeal which names only one person qualified to bring the appeal as a representative of the class, whether certified or not. (*Id.*)

Because amended Rule 3(c) clearly was intended to preserve appellate jurisdiction of a large, uncertified class action such as this where the notice of appeal does not and possibly cannot give an indication of the name of each and every plaintiff appealing, any perceived uncertainty cannot be a basis for refusing to apply the amended Rule.

Moreover, any confusion was resolved by counsel for Petitioners at oral argument before the Fifth Circuit. Counsel stated that "all plaintiffs" was the proper designation because, although only those plaintiffs listed in the briefs were appealing the final judgment, all plaintiffs were part of the appeal to the extent that reversal of the district court's denial of class certification would afford all plaintiffs an opportunity to participate as members of a class action. *See United States Parole Comm'n v. Geraghty*, 445 U.S. 388, 405-07 (1980) (named plaintiffs may appeal order denying class certification on behalf of all putative class members). Like its "fortuitousness" argument, the "confusion" rationale is not a basis for denying jurisdiction over these hundreds of Petitioners.

II. THE FIFTH CIRCUIT'S DETERMINATION THAT THE *DODSON* NOTICE OF APPEAL WAS NOT SUFFICIENT TO CONFER JURISDICTION UNDER THE PRE-AMENDMENT VERSION OF RULE 3(C) CONFLICTS WITH DECISIONS OF THE FIFTH AND OTHER CIRCUITS.

The Fifth Circuit concluded that the term "all plaintiffs" in a notice of appeal adequately identifies the appellants under the earlier version of Rule 3(c), as construed by this Court in *Torres v. Oakland Scavenger Co.*, 487 U.S. 312, 318 (1988), if "it leaves no room for doubt about

which parties were intending to appeal." (Appendix A, p. 9a.) The Fifth Circuit concludes that "all plaintiffs" in the *Lacy* notice of appeal confers appellate jurisdiction over the unnamed plaintiffs, because the notice "leaves no room for doubt about who is appealing." (*Id.* at 12a). The court explains that "while the plaintiffs in *Lacy* did add to their ranks through a supplemental complaint and two amended complaints, no plaintiffs were ever dismissed, dropped, or substituted." (*Id.*)

As to the unnamed *Dodson* plaintiffs, however, the Fifth Circuit reaches the opposite result, holding that the complexity of the *Dodson* litigation, as well as the number of individual plaintiffs entering and leaving the lawsuit, make for a record in the district court from which it is too confusing to determine to whom the term "all plaintiffs" refers. The Fifth Circuit's reasoning is erroneous for two reasons. First, as discussed above, it is nonsensical to require that "all plaintiffs" be individually listed in a case which in part involves the district court's denial of class certification, because a reversal of the district court's denial of class certification would afford all plaintiffs, whether or not individually named, an opportunity to participate as members of a class action. As the Fifth Circuit observed, "[w]hen a notice of appeal lists only the named plaintiff and 'et al.' in a class action, the notice is sufficient for the class members." (Appendix A, p. 7a (citing *Morales v. Pan American Life Ins. Co.*, 914 F. 2d 83, 85 (5th Cir. 1990)).) The Fifth Circuit's decision in this case likewise conflicts with cases from other circuits in which the naming of a class representative alone satisfied Rule 3(c). *See Olenhouse v. Commodity Credit Corp.*, 42 F.3d 1560, 1572 (10th Cir. 1994); *Al-Jundi v. Estate of Nelson Rockefeller*, 885 F.2d 1060, 1061 n.1 (2d Cir. 1989), *cert.*

denied, 502 U.S. 861 (1991); *see also Minority Employees of the Tenn. Dep't of Employment Sec., Inc. v. State of Tenn. Dep't of Employment Sec.*, 901 F.2d 1327, 1336 (6th Cir.), *cert. denied*, 498 U.S. 878 (1990).

Second, the names of the individual plaintiffs who remained at the time the district court entered its final judgment can be determined by reviewing the *Dodson* record. Yet, under the Fifth Circuit's analysis, those plaintiffs in this case who *can* be determined from the record have been denied their appeal because the Fifth Circuit concludes that there are *other* plaintiffs as to whom the court of appeals is unsure about their intent to appeal. It has never been the case, however, that confusion as to the status of some plaintiffs results in the dismissal of the appeal of those plaintiffs who *are* ascertainable from the record. *See Britt v. Grocers Supply Co.*, 978 F.2d 1441, 1444 (5th Cir. 1992) (notice of "all other 129 consenting plaintiffs" sufficient to confer jurisdiction under former Rule 3(c) even though there were actually 126 plaintiffs, not 129, because the individual entities are readily ascertainable in the record), *cert. denied*, 508 U.S. 960, *and cert. denied*, 510 U.S. 821 (1993). The Fifth Circuit's holding in this case that it has no jurisdiction over appeals brought by those *Dodson* plaintiffs who were unnamed in the notice of appeal but who are readily ascertainable in the record thus conflicts with pre-amendment Rule 3(c) jurisprudence.

CONCLUSION

Because its reasoning provides no basis for either its effective disregard of this Court's edict of April 22, 1993,

or its conflict with holdings in the Fifth and other circuits, the opinion of the Fifth Circuit requires correction. The Fifth Circuit's disregard of this Court's explicit enjoinder has adverse implications for all types of cases involving application of new procedural and jurisdictional rules to pending cases, and to any case involving an order of this Court directed to the lower courts. Petitioners respectfully request that their petition be granted.

Respectfully submitted,

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November 21, 1996

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-2353
cons. w/ No. 92-2381

RICHARD DODSON, ET AL.,

Plaintiffs-Appellants,

versus

HILLCREST SECURITIES CORP., ET AL.,

Defendants,

ALEXANDER GRANT & CO., ETC., PANNELL, KERR & FORSTER, BRANCH ORCUTT, KIRKPATRICK & CRISWELL,

Defendants-Appellees.

WILLIAM M. and LUCILE C. LACY, ET AL.,

Plaintiffs-Appellants.

versus

HILLCREST SECURITIES CORPORATION, INC., ET AL.,

Defendants,

ALEXANDER GRANT & CO., and PANNELL, KERR & FORSTER,

Defendants-Appellees.

Appeals from the United States District Court for the Southern District of Texas
(CA-H-88-1639 & CA-H-90-1864)

(Filed Jul. 24, 1996)

Before GARWOOD, SMITH and DENNIS, Circuit Judges.*

GARWOOD, Circuit Judge:

Facts and Proceedings Below

Two suits were brought in the name of investors in a government securities tax shelter involving the trade of government securities set up by securities broker/dealers and investment advisors Hillcrest Securities Corp. and Hillcrest Equities Inc. (collectively Hillcrest). The suits alleged federal (RICO and securities fraud) and Texas state law (common law fraud, negligence, breach of fiduciary duty, and Deceptive Trade Practices Act) claims against Hillcrest, three accounting firms Alexander Grant & Company, now known as Grant Thorton LLP (Grant), Pannell, Kerr & Foster (PKF), and Branch, Orcutt, Kirkpatrick & Criswell (BOKC)[1] –, and others after the Internal Revenue Service (IRS) determined that the

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* Pursuant to Local Rule 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in Local Rule 47.5.4.

[1] BOKC was only named in the first of the two suits.

reported trades in government securities were never made.[2]

One suit was filed against Hillcrest, Grant, PKF, and others not party to this appeal, on May 11, 1988 (the *Dodson* suit). The *Dodson* suit was filed by Sidney Ravkind as attorney for Richard Dodson, David L. Standlee, the Hillcrest Investigation Trust (the Trust) – later known as Hillcrest Investigative Participants (HIP) –, and a class comprised of investors in the Hillcest tax shelter program. After the district court denied plaintiffs' motion for class certification, more than a thousand additional plaintiffs were added by means of a multitude of amended, supplemental, and supplemental amended complaints. On February 13, 1990, an interlocutory judgment was entered against Hillcrest, holding that it was liable to the *Dodson* plaintiffs for their actual damages. Actual damages were to be determined by jury trial at a later date.

Discovery commenced in the *Dodson* suit in February 1990. In October 1990, the magistrate ordered 600 to 800

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[2] The investors allege that they invested in Hillcrest investments in reliance on representations that the accountants would audit and verify the transactions in government securities by visiting primary and secondary dealers to verify the authenticity of the trades. Ed Markowitz (Markowitz), not a party here or below, a securities trader, allegedly ran a fraudulent scheme involving the Hillcrest trading program in which very few legitimate trades were actually made. Plaintiffs allege that Hillcrest prepared paperwork showing the existence of transactions that never occurred and that the accountants were aware of the fraudulent scheme but continued to make fraudulent representations to the investors regarding the Hillcrest investments from 1981 to 1984.

plaintiffs who had failed to file any interrogatory responses dismissed with prejudice. In January 1991, after repeated discovery abuses by plaintiffs, the magistrate found that none of the interrogatory answers of the remaining hundreds of plaintiffs were adequate and recommended dismissing all *Dodson* plaintiffs except those who had been deposed. BOKC was first named as a defendant in the *Dodson* suit in Plaintiffs' Fourth Amended Complaint, which the magistrate granted leave to file on April 8, 1991. On April 1, 1992, the district court adopted the magistrate's recommendation and dismissed all *Dodson* plaintiffs who had not been deposed for their repeated failure to obey discovery orders. In the same order, the district court dismissed the remaining *Dodson* plaintiffs by granting summary judgment motions filed by Grant and PKF on statute of limitations grounds. Two days later, the district court granted BOKC's motion for summary judgment on statute of limitations grounds. A timely notice of appeal was filed in the *Dodson* suit.

On June 11, 1990, after the court-imposed cutoff date for intervention in *Dodson*, Ravkind filed a second suit, this one on behalf of twenty four named plaintiffs, against Hillcrest, PKF, and Grant (the *Lacy* suit). In an order dated April 23, 1992, the district court dismissed the *Lacy* suit.[3] A notice of appeal was timely filed in the *Lacy* case.

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[3] The court also dismissed the suit against Hillcrest for failure to prosecute the *Lacy* suit under Rule 41(b).

Discussion

I. Notice of Appeal

As a threshold matter, we must determine whether we have jurisdiction of the *Dodson* and *Lacy* appeals and, if we do, over which parties. *McLemore v. Landry*, 898 F.2d 996, 999 (5th Cir.), *cert. denied*, 111 S.Ct. 428 (1990). Failure to adequately comply with Federal Rule of Appellate Procedure Rule 3(c) deprives this court of jurisdiction over an attempted appeal. *Torres v. Oakland Scavenger Co.*, 108 S.Ct. 2405, 2409 (1988). Rule 3(c) requires notices of appeal to "specify the party or parties taking the appeal. . . . " Fed. R. App. P. 3(c). The notice of appeal in *Dodson* and *Lacy* are captioned, respectively, "Richard Dodson, et al." and "William M. and Lucile C. Lacy, et al." No other plaintiffs are identified by name, but the text of the notices of appeal state that "all Plaintiffs" appeal. We must determine whether the designation of "all plaintiffs" in the *Dodson* and *Lacy* notices of appeal satisfies the Rule 3(c) requirement to specify the parties as the rule existed at the time these appeals were brought.[4]

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[4] Rule 3(c) was amended while this appeal was pending. Appellants argue that the amended Rule should be applied in their cases. Under amended Rule 3(c), effective September 1, 1993, the *Dodson* and *Lacy* notices of appeal would be sufficient. *See* Fed. R. App. P. 3(c) ("An attorney representing more than one party may fulfill [the naming of the parties] requirement by describing those parties with such terms as 'all plaintiffs,' 'the defendants,' 'the plaintiffs A, B, et al.,' or 'all defendants except X.' "). The Supreme Court order adopting the relevant amendment states that the amendment shall govern "insofar as just and practicable, all proceedings in appellate cases then

"The purpose of the specificity requirement of Rule 3(c) is to provide notice both to the opposition and to the court of the identity of the appellant or appellants." *Torres*, 108 S.Ct. at 2409. Permitting vague designations of parties "would leave the appellee and the court unable to determine with certitude whether a losing party not named in the notice of appeal should be bound by an

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pending." *Garcia v. Wash*, 20 F.3d 608, 609 (5th Cir. 1994) (quoting the Supreme Court's April 1993 order). Because we hold *infra* that the notice of appeal in *Lacy* is sufficient under the pre-amendment rule, we need not determine whether it would be just and practicable to apply the amended rule to *Lacy* retroactively. We must, however, address this argument as to *Dodson*.

The *Dodson* notice of appeal was filed in mid-August 1992 and the appellees' motion to dismiss the appeal for lack of jurisdiction were filed in mid-October of 1992. In November 1992, this Court ordered that the motion to dismiss be carried with the appeal on the merits. On January 4, 1993, the appeal was automatically stayed upon PKF's filing for bankruptcy. The amendment to Rule 3(c) did not become effective until almost eleven months later, on December 1, 1993 (the Supreme Court did not promulgate amended Rule 3(c) until April 22, 1993). The pre-amendment Rule 3(c) unquestionably would have applied to the *Dodson* appeal if either (1) this Court had ruled on the motion to dismiss when it was made; or (2) PKF had not filed for bankruptcy. Because it is merely fortuitous that the *Dodson* appeal has taken such a long time to be considered by this Court, we hold that it would not be "just and practicable" to apply amended Rule 3(c) retroactively to it. We also note that the continual alteration of plaintiffs in *Dodson* and the uncertainty even at oral argument about who was appealing adds support to this conclusioin. Because we hold that Rule 3(c) should not be applied retroactively in this instance, we do not reach appellees' argument that retroactive application is unconstitutional under *Plaut v. Spendthrift Farm*, 115 S.Ct. 1447 (1995).

adverse judgment or held liable for costs or sanctions." *Id.* When a notice of appeal lists only the named plaintiff and "et al." in a class action, the notice is sufficient for the class members. *Morales v. Pan American Life Ins. Co.*, 914 F.2d 83, 85 (5th Cir. 1990) (citing *Rendon v. AT&T Technologies*, 883 F.2d 388, 398 n.8 (5th Cir. 1989)). Because we hold *infra* that the district court did not abuse its discretion in denying class certification, we must consider whether the plaintiffs *individually* joined in *Dodson* and *Lacy* were sufficiently named in the notices of appeal. The question facing this Court is whether designating "all plaintiffs" as parties to the *Dodson* and *Lacy* appeals met the specificity requirement of Rule 3(c) as it existed prior to the 1993 amendment.

Defendants argue that, under the version of Rule 3(c) in effect at the time the notices of appeal were filed, "all plaintiffs" is too ambiguous to meet the specificity requirement, and thus, that we have jurisdiction over only the plaintiffs named specifically in the notices of appeal: Richard Dodson, William M. Lacy, and Lucile C. Lacy. The Circuits are split regarding whether "all plaintiffs" or similar language satisfies the specificity requirement of pre-1993 Rule 3(c). *See e.g., Adkins v. United Mine Workers of America*, 941 F.2d 392, 397 (6th Cir. 1991), *cert. denied*, 112 S.Ct. 1180 (1992) (holding "all of the plaintiffs" sufficient); *Santos-Martinez v. Soto-Santiago*, 863 F.2d 174, 175-76 (1st Cir. 1988) (holding "all plaintiffs" insufficient when five of the eight plaintiffs did not actually wish to appeal).

Under pre-1993 Rule 3(c), individuals are not adequately specified by either the phrase "et al." in the caption or the phrase "plaintiffs" in the text of the notice.

See e.g., Torres, 108 S.Ct. at 2409; *Colle v. Brazos County, Texas,* 981 F.2d 237, 240-41 (5th Cir. 1993); *Samaad v. City of Dallas,* 922 F.2d 216, 219 (5th Cir. 1991). Similarly, this Court has rejected the designation "the defendants in this action" as insufficient under Rule 3(c) because it failed to provide certainty regarding which of the six defendants joined in the appeal. *Resolution Trust Corp. v. Sonny's Old Land Corp.,* 937 F.2d 128, 129 (5th Cir. 1991). In *McLemore,* this Court held an even more specific designation to be insufficient under Rule 3(c). *McLemore,* 898 F.2d at 999-1000 (holding that a notice of appeal designating "River Villa, A Partnership, and the respective individual partners therein" was insufficient to confer jurisdiction over an appeal by anyone other than the named partnership). In so holding, however, we suggested that the notice of appeal was insufficient because one of the fifteen partners of the named partnership may not have been appealing jointly with the partnership. *See id.* at 1000 n.6 (noting that one partner was named as a third-party defendant by the partnership and had interests inconsistent with the other partners).

The decision in *Britt v. Grocers Supply Co.,* 978 F.2d 1441 (5th Cir. 1992), *cert. denied,* 113 S.Ct. 2929 (1993), helps to clarify our previous decisions involving generic phrases such as "plaintiffs" and "defendants." The plaintiffs in the *Britt* case consisted of two originally named plaintiffs and another 126 opt-in plaintiffs under 29 U.S.C. § 216(b). *Id.* at 1444. The caption of the *Britt* notice of appeal used "et al.," but the text of the notice identified the remaining appellants as "all other 129 consenting Plaintiffs who have previously filed their written consent pursuant to 29 U.S.C. Section 216(b)." *Id.* We held that the

notice complied with Rule 3(c) – even though there were actually 126 opt-in plaintiffs, not 129 – "[b]ecause the notice in this case states that *all* of a particular defined group are taking an appeal, *and* the individual entities are *readily ascertainable in the record. . . .* " *Id.* (emphasis added). We went on to specifically hold that "it is not necessary to list the names of each appealing party, *as long as there can be no mistake about which parties are intending to appeal.*" *Id.* at 1444-45 (emphasis added); *see also Pope v. Mississippi Real Estate Comm'n*, 872 F.2d 127, 129 (5th Cir. 1989) (holding designation of "plaintiffs" in text of notice sufficient when there were only two plaintiffs, one of whom was named in the caption, because "et al." could logically apply only to the one unnamed plaintiff). Accordingly, the phrase "all plaintiffs" may suffice to meet the specificity requirement of Rule 3(c) *if* it leaves no room for doubt about which parties were intending to appeal. On the other hand, if, for some reason specific to the individual appeal, the phrase "all plaintiffs" leave room for the court and the parties to doubt who intends to appeal, then the notice fails to comply Rule 3(c). *See McLemore*, 898 F.2d at 1000 n.6.

A. The *Dodson* Notice of Appeal

Though the *Dodson* notice of appeal states that "all plaintiffs" are appealing, it is almost impossible to tell to whom that phrase applies. The named plaintiffs were in continual flux in the district court, and one must make a close examination of the record to determine who were *Dodson* plaintiffs at any particular time. More than a thousand plaintiffs were added to the *Dodson* suit by

numerous amended, supplemental, and supplemental amended complaints.[5] In addition to the adding and subtracting of plaintiffs through pleadings, hundreds of plaintiffs were dismissed for discovery sanctions. At least one plaintiff who was dismissed with prejudice was again added as plaintiff in a later pleading. Throughout the litigation, plaintiffs also filed motions to substitute new parties for named deceased plaintiffs. The court granted the motions to allow substitution in part.

Because of the complexity of the *Dodson* litigation, many motions often were outstanding at once. For example, on January 18, 1990, plaintiffs filed a status report listing over 1200 plaintiffs who had been named in at least one pleading and recognizing that the court had yet to rule on several of those pleadings. No attempt was

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[5] The original complaint named three specific plaintiffs and a purported class. More than a year later, Plaintiffs' Second Amended Complaint and RICO Case Statement deleted one original plaintiff and added two new plaintiffs. Throughout the *Dodson* litigation, plaintiffs attempted to file at least six supplemental complaints. Most of these attempts were successful, though it appears that no court ever ruled on Plaintiffs' motion for leave to file their Fifth Amended Supplemental Complaint. While adding named plaintiffs through supplemental complaints, plaintiffs also filed a motion for leave to file Plaintiffs' Third Amended Complaint on December 18, 1990. Leave to file the Third Amended Complaint was granted prior to March 5, 1990. More than nine months later, plaintiffs filed a motion for leave to file Plaintiffs' Fourth Amended Complaint and Rico Case Statement. The motion was granted on April 8, 1991, and they filed such pleading on the same date. The April 8, 1991 pleading listed many fewer plaintiffs than the previous pleading, though it still named more than 600 plaintiffs.

made to separate those named who were properly plaintiffs and those who were merely potential plaintiffs. It is impossible to tell who "all plaintiffs" in *Dodson* actually were at any particular time without extensive review of the record, and even then there is confusion and ambiguity.

Even if the record were not so confusing regarding who were *Dodson* plaintiffs at any particular time, the notice of appeal in *Dodson* would still be insufficient because on briefing and argument it has been made clear that "all plaintiffs" – if that is taken to mean every plaintiff ever named in *Dodson* (and from the face of the notice of appeal and the record below one could not confidently conclude that such was not intended) – are not actually appealing. When asked at oral argument who "all plaintiffs" are, counsel for appellants responded "all plaintiffs listed in the briefs and all plaintiffs in the case below." Yet, not every person who was ever listed as a plaintiff below is listed in appellants' briefs, and it now appears that at least the six hundred to eight hundred plaintiffs who were dismissed for failing to answer any interrogatories are not appealing. In other words, "all" does not really mean all in the *Dodson* notice of appeal. *See McLemore*, 898 F.2d at 1000 n.6; *Santos-Martinez*, 863 F.2d at 175-76. There is certainly doubt about which *Dodson* plaintiffs – other than Dodson himself – could be held liable for costs or sanctions. *See Torres*, 108 S.Ct. at 2409. For these reasons, we hold that the notice of appeal in *Dodson* is insufficient to confer jurisdiction over an appeal by any party other than Richard Dodson.

B. The *Lacy* Notice of Appeal

Although the wording of the notice of appeal in *Lacy* is identical to the wording of the *Dodson* notice, the result is different. The phrase "all plaintiffs" in the *Lacy* notice of appeal leaves no room for doubt about who is appealing because, while the plaintiffs in *Lacy* did add to their ranks through a supplemental complaint and two amended complaints, no plaintiffs were ever dismissed, dropped, or substituted. Not only does this make rooting through the record to determine who are "all plaintiffs" unnecessary, it distinguishes the *Lacy* appellants by the fact that they appealed every order which dismissed any plaintiff for the suit. "All" clearly means all in the *Lacy* notice of appeal. As in *Britt*, we hold that there can be no mistake about which parties are intended to appeal in *Lacy's* notice of appeal. *See Britt*, 978 F.2d at 1444-45. Thus, we have jurisdiction over all plaintiffs in *Lacy*.

II. Denial of Class Certification

Dodson appeals the district court's denial of the motion for class certification in *Dodson*. We will not overturn a decision to deny class certification unless the district court has abused its wide discretion. *See McGrew v. Texas Bd. of Pardons & Paroles*, 47 F.3d 158, 162 (5th Cir. 1995).

The *Dodson* plaintiffs filed a motion for class certification on March 1, 1989, requesting that the court certify named plaintiffs Richard Dodson and David L. Standlee as class representatives. The class was to be composed of all investors in the Hillcrest Securities trading program.

In the closing paragraph of the motion, plaintiffs requested that the court set the motion for hearing. Prior to the filing of the motion, the district court on January 26, 1989 had scheduled a hearing on class certification for July 5, 1989. PKF and Grant in early May, 1989 filed memoranda in opposition to plaintiffs' motion for class certification. In these memoranda, PKF and Grant argued that the motion should be denied because, *inter alia*, Dodson and Standlee did not adequately represent the class. Plaintiffs never filed a reply to these memoranda.

On June 29, 1989, the hearing on class certification set for July 1989, was canceled, and no hearing was ever held on the issue. The district court denied plaintiffs' motion for class certification without opinion in an order dated October 19, 1989. Plaintiffs never filed a motion for reconsideration or, as far as we can tell, ever complained to the district court about ruling on the class certification issue without hearing or benefit of a plaintiffs' reply brief. Dodson argues on appeal that the district court committed procedural error in denying class certification without opinion or a hearing and without setting a new date for the reply to the defendants' memoranda. Plaintiffs have waived these procedural complaints by failing to raise them below.[6] *See, e.g., McGill v. Gott*, 17 F.3d 729, 732

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[6] Dodson argues that the plaintiffs did not waive these arguments because they were prevented from filing a reply brief by the court's stay order of May 4, 1989. This argument is without merit. The court's order stayed all discovery in *Dodson* until the related criminal suit came to a final resolution and suspended all docket control dates until further notice by the court. It did not prevent the parties from filing motions or responses. In fact, plaintiffs and defendants continued to file

(5th Cir. 1994) (appellants' failure to raise alleged procedural error – that hasty adoption of magistrate's report and recommendation before they had opportunity to file objections – by motion to reconsider or otherwise before district court resulted in waiver of the alleged procedural irregularity); *Atlantic Mut. Ins. Co. v. Truck Ins. Exchange*, 797 F.2d 1288, 1293-94 (5th Cir. 1986) (holding that failure to raise issue before district court results in waiver); *Long v. McCotter*, 792 F.2d 1338, 1345 (5th Cir. 1986) ("we ordinarily do not consider issues that have not been presented to the court of first instance") (citations omitted). Even if plaintiffs had not waived these procedural complaints, we would still affirm the district court's denial of the class certification because appellant cannot show any prejudice from the alleged procedural errors. *See Merrill*, 806 F.2d at 608-09 (affirming denial of class certification because any error was harmless).

> "An action may be maintained as a class action if it meets the criteria of 'numerosity,

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motions and other documents with the court. For example, plaintiffs filed (1) several notices of intent to take depositions, (2) a second amended complaint, (3) a motion for default judgment on July 21, 1989, and (4) responses to defendants' motions to strike, for extension of time, and to quash or postpone depositions. Yet plaintiffs never filed a response to the defendants' memoranda on denying class certification. More importantly, plaintiffs never filed a motion for reconsideration of the denial of class certification: they never gave the district court the chance to correct its own alleged procedural errors. *See Merrill v. Southern Methodist University*, 806 F.2d 600, 609 (5th Cir. 1986) ("We take a very dim view of parties who silently permit the trial court to slip into claimed error only to complain for the first time on appeal.").

> commonality, typicality, and adequacy of representation,' the questions of law or fact involved 'predominate' over any issues affecting individual members of the class, and a class action is the 'superior' method of handling the action." *McGrew*, 47 F.3d at 162 (citations omitted).

Because absent class members will be bound by the judgment in a class action law suit, strict review of the adequacy of representation is required. *See Susman v. Lincoln American Corp.*, 561 F.2d 86, 90 (7th Cir. 1977) (citations omitted). This Court looks to two criteria to determine adequate representation: "(1) the [proposed] representative must have common interests with the unnamed members of the class; and (2) it must appear that the [proposed] representative will vigorously prosecute the interests of the class through qualified counsel." *Gonzales v. Cassidy*, 474 F.2d 67, 72 (5th Cir. 1973). We affirm the district court's denial of class certification because it would have been an abuse of discretion to hold that it appeared that either Standlee or Dodson – the only two proposed class representatives – would vigorously prosecute the suit through qualified class counsel.

Dodson makes no argument on appeal that Standlee was an adequate representative. Clearly Standlee could not have vigorously prosecuted the suit because, when the court denied class certification, he had been dismissed from the suit with prejudice for willful refusal to appear at his deposition. Thus, he was inadequate as a class representative.

The argument for Dodson's adequacy is not much stronger. Though he remained as a named plaintiff, he admitted that he "did not want to be heavily involved" in

the case. Dodson did not authorize the suit before it was filed, though he did later ratify it. Dodson admitted that he had no understanding of what it means to be a class representative. He also admitted that he did not know who Grant is or what role either Grant or PKF played in the Hillcrest securities program. Finally, proposed class counsel Ravkind had serious conflicts of interest with the proposed class: he was simultaneously representing Mack Hickman, a criminal defendant charged with defrauding the very investors belonging to the proposed class. It certainly does not appear that Dodson would vigorously prosecute the interests of the class either on his own or through "qualified counsel." *See Gonzales*, 474 F.2d at 72 (quoting with approval *Eisen v. Carlisle and Jacquelin*, 391 F.2d. 555, 562 (2d Cir. 1968) ("[A]n essential concomitant of adequate representation is that the party's attorney be qualified, experienced and generally able to conduct the proposed litigation.") (brackets in original)). For these reasons, we affirm the district court's denial of class certification.[7]

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[7] Furthermore – though the causes of action against Grant, PKF, and BOKC are based on allegations that they solicited and/or attracted the plaintiff-investors to invest in Hillcrest securities offerings and represented to the investors that they would be responsible for all of the trades to be made – Dodson relied solely upon information he received from his personal accountant and a broker-friend when he invested in Hillcrest securities. Dodson attended no group meetings describing the Hillcrest securities trading program, and he made it aundantly clear that he did not read any materials at all regarding the Hillcrest investments. Thus, Dodson's claims, if they withstand failure-to-state-a-claim scrutiny, are not typical of those who actually did rely on representations by the defendants. *See* Fed. R. Civ. P. 23(a).

II. Statute of Limitations[8]

A four-year limitations period, coupled with a discovery rule, applies to plaintiffs' RICO, federal securities law, and Texas common law fraud actions. *See e.g., Agency Holding Corp. v. Malley-Duff & Assoc., Inc.*, 107 S.Ct. 2759 (1987) (RICO); *Sioux Ltd., Sec. Litig. v. Coopers & Lybrand*, 914 F.2d 61, 63 (5th Cir. 1990) (federal securities fraud and Texas common law fraud); 15 U.S.C. § 78aa 1(a) (pending claims of federal securities fraud governed by law as it existed on June 19, 1991).[9] Claims under Texas law for breach of fiduciary duty, negligence, and Deceptive Trade Practices Act (DTPA) violations are subject to a two-year statute of limitations. *See Russell v. Campbell*, 725 S.W.2d 739, 744, 748 (Tex. App. – Houston [14th Dist.] 1987, *writ ref'd n.r.e.*) (breach of fiduciary duty, professional negligence, and DTPA); *Sioux Ltd., Sec. Litig.*, 914 F.2d at 64 (negligent misrepresentation). The state law DTPA and breach of fiduciary duty claims are subject to a discovery rule; the negligent misrepresentation claim is not. *See* Tex. Bus. & Com. Code § 17.565 (DTPA); *Kansa Reinsurance Co., Ltd. v. Congressional Mortgage Corp. of Texas*, 20 F.3d 1362, 1373 (5th Cir. 1994) (negligent misrepresentation); *Woodbine Elec. Serv., Inc. v. McReynolds*, 837 S.W.2d 258, 262

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[8] While plaintiffs in both *Dodson* and *Lacy* also alleged violations of the Texas Securities Act, the appellants waived any argument that the district court improperly dismissed these claims on statute of limitations grounds by failing to address the issue in their briefs. *See Carmon v. Lubrizon Corp.*, 17 F.3d 791, 794 (5th Cir. 1994)

[9] While the Supreme Court has held § 78aa-1(b) unconstitutional, the reasoning does not extend to render § 78aa-1(a) unconstitutional. *See Plaut*, 115 S.Ct. at 1447.

(Tex. App. – Eastland 1992, no writ) (accounting malpractice).[10]

A. The *Dodson* Suit

On this appeal from summary judgment granted on statute of limitations grounds, this Court views the facts in the light most favorable to Dodson. *See Corwin v. Marney, Orton Investments*, 843 F.2d 194, 195 (5th Cir. 1985), *cert. denied*, 109 S.Ct. 305 (1988).

1. Accrual

Federal law determines when the limitations period begins to run on the federal claims, and state law dictates the result for state law claims. *See F.D.I.C. v. Shrader & York*, 991 F.2d 216, 220 (5th Cir. 1993), *cert. denied*, 114 S.Ct. 2704 (1994). Under federal law, Dodson's causes of action accrued when the illegal acts allegedly occurred. *See e.g., La Porte Construction Co. v. Bayshore Nat'l Bank of La Porte, Texas*, 805 F.2d 1254, 1256 (5th Cir. 1986). His federal claims all accrued prior to May 11, 1984, because

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[10] One Texas appellate court has held that the discovery rule applies to accounting malpractice and negligence claims only when the plaintiff was a client of the accountant. *See Brown v. KPMG Peat Marwick*, 856 S.W.2d 742, 747-49 (Tex.App. – El Paso 1993, *writ denied*). While the court specifically held that the auditor/non-client relationship in *Brown* did not permit the application of the discovery rule, the reasoning in *Brown* suggests that the discovery rule is appropriate in claims based on fiduciary duty. *See id.* Accordingly, we hold that the discovery rule is applicable to the breach of fiduciary duty claims.

all of defendants' alleged misdeeds were alleged to have been performed prior to that date.

State law is less clear. Under Texas law, tort-based causes of action generally accrue when the tort is committed. *Randolph v. Resolution Trust Corp.*, 995 F.2d 611, 617 (5th Cir. 1993) (citing *Atkins v. Crosland*, 417 S.W.2d 150, 153 (Tex. 1967)), *cert. denied*, 114 S.Ct. 1294 (1994). This is true even if the damages are not ascertainable until a later date. *Id.* But a cause of action does not accrue until a legal injury has been sustained. *Id.* Dodson relies on *Atkins* and our holding in *Bauman v. Centex Corp.*, 611 F.2d 1115 (5th Cir. 1980) for the proposition that he suffered no legal injuries until the IRS sent notice of tax deficiencies.

In *Atkins*, the Texas Supreme Court held that the defendant accountant's use of the cash method, as opposed to the accrual method, "was not in itself the type of unlawful act which, upon its commission, would set the statute in motion." *Atkins*, 417 S.W.2d at 153. Following *Atkins*, we noted that under Texas law a fraudulent misrepresentation tort "is not complete until the [plaintiff] acts [on the misrepresentation] to his detriment." *Bauman*, 611 F.2d at 1119. We have recently noted that *Bauman* holds that "misrepresentation *by itself* is not enough to establish harm because it is still possible for the plaintiff to earn a profit after the misrepresentation." *Oliver Resources PLC v. International Fin. Corp.*, 62 F.3d 128, 131 n.3 (5th Cir. 1995) (emphasis added). Thus, we have held that legal injury did not occur to one of the plaintiffs until he "went further into debt and purchased stock in an attempt to rectify a problem allegedly caused by" the defendant's misconduct. *Randolph*, 995 F.2d at 618.

Unlike the potential harm in *Bauman* and *Oliver Resources PLC* – which was not inevitable because of the inherent unpredictability of the marketplace incurred tax liability is analogous to the debt incurred in *Randolph*. It is itself enough to constitute a legal injury. *See Randolph*, 995 F.2d at 618; *see also Bankruptcy Estate of Rochester v. Campbell*, 910 S.W.2d 647, 650 (Tex.App. – Austin, 1995, *writ granted* Apr. 12, 1996) (interpreting *Atkins* and holding that "the 'legal injury rule' provides that a party has been damaged [by accounting malpractice], for purposes of limitations, when the party discovers a concrete and specific risk to an economic interest"); *Ponder v. Brice & Mankoff*, 889 S.W.2d 637, 642 (Tex.App. – Houston [14th Dist.] 1994, *writ denied*) (holding that claims arising from bad tax advice accrue "on a fact specific basis when [the taxpayer] discovers a *risk* of harm to his economic interest, whether that be at the time of assessment or otherwise.") (quoting *Hoover v. Gregory*, 835 S.W.2d 668, 673) (Tex.App. – Dallas 1992, *writ denied*) (emphasis added). Consequently, Dodson suffered legal injury when Markowitz failed to make the trades in government securities and the accountants failed to perform the proper audits because it was at this point that the plaintiffs became legally liable for the taxes for which they later unwittingly claimed wrongful deductions. It is undisputed that the allegedly wrongful actions took place prior to May 11, 1984. Accordingly, Dodson's state law claims (like his federal claims) had accrued prior to May 11, 1984. Because negligent misrepresentation is not subject to the discovery rule, *Kansa Reinsurance Co. Ltd.*,[11] Dodson's

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[11] Dodson also argues that his causes of action were tolled while he was defending the paper trades to the IRS. He cites no

claim on this ground had expired prior to when he filed suit. In any event, as demonstrated *infra*, Hillcrest's May 11, 1984 letter put plaintiffs on notice well before May 1, 1986 and hence claims with two years limitations, such as negligent misrepresentation, were clearly barred when the *Dodson* suit was filed May 11, 1988. We affirm the district court's grant of summary judgment on Dodson's state law negligent misrepresentation claim.

2. The Discovery Rule

Both federal and state law allow, under certain circumstances, for tolling of the statute of limitations after the causes of action have accrued. Under federal law, the limitations period is extended by the discovery rule until a party has notice of " 'storm warnings' which would alert a reasonable investor to the possibility of fraudulent statements or omissions. . . . " *Jensen v. Snellings*, 841 F.2d 600, 607 (5th Cir. 1988). A person with notice of such storm warnings must proceed with a reasonable and diligent investigation, and is charged with the knowledge of all facts such an investigation would have disclosed. *Id.* We refer to the chargeable knowledge as inquiry notice. The Texas discovery rule is similar. Texas limitations periods run from the date the plaintiff (1) discovers or, in the exercise of reasonable care and diligence, should have discovered the injury, or (2) was on notice of such facts as

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federal authority for this proposition, and the Texas courts have strictly limited the *Hughes v. Mahaney & Higgins*, 821 S.W.2d 154 (Tex. 1991) litigation exception to toll only legal malpractice claims while the litigation in which the alleged legal malpractice occurred is pending. *See Hoover*, 835 S.W.2d at 675-76.

would cause a reasonably prudent person to make an inquiry that would lead to the discovery of the cause of action. *Hoover*, 835 S.W.2d at 671. Generally, the reasonableness of plaintiffs' actions, including the reasonableness of inquiring or failing to inquire, is a fact question for the jury. *Corwin*, 843 F.2d at 198.

The district court held that *Dodson* was filed one day late because the statutes of limitations began running on May 10, 1984, the day that a particular *Wall Street Journal* article was published. The May 10, 1984 *Wall Street Journal* contained an article reporting that Markowitz agreed to plead guilty to fraud and was suspected of providing customers with millions of dollars of paper losses in trades on government securities while actually making very few legitimate trades. The article noted that Hillcrest had traded with Markowitz in securities valued at more than $1 billion. The district court purported to rest its grant of summary judgment on four grounds: (1) the *Wall Street Journal* article gave plaintiffs actual or constructive notice of the violations; (2) Hillcrest mailed plaintiffs copies of the article on May 11, 1984, (3) plaintiffs, through Hickman, made a binding admission that the limitations period ran on May 10, 1988, and (4) some of the plaintiffs admitted to reading the article on the day it was published. The appellees rely on the district court's rationales for dismissing Dodson on limitations grounds, and we address the first three grounds,[12] along with a

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[12] As a preliminary matter, we note that the last of the district court's above-mentioned rationales for dismissing the *Dodson* suit, though perhaps relevant to class members, is irrelevant as to any notice Dodson himself received.

proposed alternative ground applicable only to BOKC, below.

a. The *Wall Street Journal* Article

Appellees point to no evidence that Dodson received actual notice of the contents of the *Wall Street Journal* article on the day of its publication.[13] Instead, they argue that the *Wall Street Journal* article constituted constructive inquiry notice to all of the investors, including Dodson,

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[13] The only evidence that might be considered to show that Dodson read the article on the day of its publication is an inference which could arguably be drawn from the following interrogatory and Dodson's answer:

> "Q: On what date and how did you first learn of any facts concerning the allegations in your complaint and the identity of the Persons or Documents that were the source of any such knowledge?
>
> A: In general, the first indication of possible wrongdoing is in a *Wall Street Journal* article published on May 10, 1984 involving Markowitz."

Because all reasonable inferences must be drawn in favor of the nonmovant on a motion for summary judgment, this interrogatory answer is, of itself, insufficient to find as a matter of law that Dodson had actual notice on May 10, 1984. Furthermore, defendants complained to the district court that this answer was vague and *did not* tell them when Dodson actually read the article. It does not appear that defendants ever argued below that Dodson had actual notice of the article on the day of its publication. In fact, in a hearing before the district court on March 15, 1991, defendants' counsel suggested that if the district court granted their statute of limitations motion, Dodson would remain as the only plaintiff.

on the day of its publication. A plaintiff can be charged with constructive inquiry notice only if a reasonably diligent person in his situation would have become aware of the facts comprising inquiry notice. *See Corwin,* 843 F.2d at 198. Accordingly, plaintiffs have been charged with constructive notice of events that receive "widespread publicity" or that are "widely publicized." *See e.g., State of Texas v. Allan Constr. Co.,* 851 F.2d 1526, 1527, 1534 (5th Cir. 1988) (state deemed to be aware of "widely publicized" federal grand jury proceedings); *United Klans of America v. McGovern,* 621 F.2d 152, 154 (5th Cir. 1980) (corporate plaintiff put on notice by "widespread publicity" resulting from attorney general's press conference attended by virtually all national media; in addition, Senate report and letter received by president of corporate plaintiff gave notice); *In re Beef Indus. Antitrust Litig.,* 600 F.2d 1148, 1170 (5th Cir. 1979) (plaintiffs on constructive notice because reasonably diligent plaintiffs would have been aware of "widely publicized" reports of charges of collusion in industry and of lawsuit similar to plaintiffs' suit), *cert. denied,* 101 S.Ct. 280 (1980). Appellees point to no case, however, in which a single newspaper article was considered significantly widespread to constitute constructive notice, and we find none. We will not hold as a matter of law that a reasonably diligent investor would have certainly read a single newspaper article on the day of its publication, even if published in a national newspaper such as the *Wall Street Journal.* The *Wall Street Journal* article, without more, does not establish May 10, 1984 as the date on which Dodson received constructive inquiry notice as a matter of law.

b. Hillcrest's Letter to Investors

Hillcrest prepared a letter, dated May 11, 1984, advising all of its investors of the *Wall Street Journal* article and that Hillcrest had made a number of trades through Markowitz-controlled entities in 1982, 1983, and 1984. This letter – stating that Hillcrest (1) was unable to advise them whether the IRS was investigating any Hillcrest transactions, and (2) did not have documentation for at least some of the trades purportedly made by Markowitz – gave "storm warnings" that would lead reasonable investors who received the letter to suspect the possibility of wrongdoing and to conduct further inquiry. *Jensen*, 841 F.2d at 607; *see also Bell v. Showa Denko K.K.*, 899 S.W.2d 749, 754 (Tex. App. – Amarillo 1995, *writ denied*) (limitations start running when plaintiff acquires knowledge of facts which would cause reasonable person to diligently make inquiry to determine his or her legal rights).

There is undisputed record evidence in *Dodson* that the letter was sent to all investors on May 11, 1984. We hold that this undisputed record fact is some evidence that Dodson received the letter at some reasonable amount of time after May 11, 1984. Because the letter could not have provided Dodson with notice prior to May 11, 1984 – and because Dodson filed suit on May 11, 1988 – the letter is not grounds for affirming the district court's order dismissing Dodson's federal claims or his Texas common law fraud claims on statute of limitations grounds. It is grounds, however, for dismissing those claims which have two-year statutes of limitations. Consequently, we affirm the district court's grant of summary

judgment on all of Dodson's state law claims other than his claim of Texas common law fraud.[14]

c. Hickman's Letter to Investors

At some time prior to May 10, 1988, Mack Hickman circulated a letter to other Hillcrest investors, attempting to garner interest in suing Hillcrest and others. This letter informed the investors that the Trust had been formed and would obtain Mandell & Wright as legal counsel to file a class action law suit. The letter also stated that the Trust had been advised that if the investors did not file suit by May 10, 1988, their claims would expire. Appellees argue that this letter supports the district court's summary judgment dismissal of the suit on statute of limitations grounds for two reasons. First, they argue that the appellants waived any argument that they were not bound by this statement. Second, appellees argue that the letter was an admission of fact which binds all of the appellants. Each of these arguments is without merit as to Dodson.

Appellees argued in the district court that the plaintiffs who claimed to be members of the Trust or HIP were bound by "admissions" it had made through Hickman. They did not argue that Dodson, who never claimed to be

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[14] We reject Dodson's argument that fraudulent concealment tolled the statute of limitations beyond the discovery rule. Once one is under a duty to inquire, "fraudulent concealment does not trump the discovery rule. . . . " *Colonial Penn Ins. Co. v. Market Planners Ins. Agency, Inc.*, 1 F.3d 374, 377 (5th Cir. 1993) (describing Texas law).

a member of the Trust, was bound by any such "admissions." Accordingly, Dodson could not have waived any argument to the contrary. Even if Hickman's letter were binding on Dodson, which is unlikely, the letter is not a judicial admission. *Compare to Davis v. A.C. Edwards and Sons, Inc.*, 823 F.2d 105, 107-08 (5th Cir. 1987). Neither does the letter admit facts which would be conclusive on the issue of statute of limitations; it merely states what Hickman was *advised* regarding the statute of limitations. *Compare id.* The advice Hickman mentions could very well have been in error. The Hickman letter does not establish that Dodson's claims were barred by the statute of limitations.

3. Allegedly Improper Relation Back for BOKC

BOKC argues that the statute of limitations bars Dodson's remaining claims against it, even if it does not bar these claims against the other defendants, because it was not sued until April 8, 1991, almost three years after the original complaint was filed. As noted above, the statute of limitations had began running on Dodson's claims long prior to January 1987. Thus, absent some other tolling provision, Dodson's federal law claims had expired long before April 8, 1991. Federal Rule of Civil Procedure 15(c) operates to toll statutes of limitations for claims which relate back to a timely claim under its provisions. *Kansa Reinsurance Co., Ltd.*, 20 F.3d at 1366-67 & n.4. This relation back doctrine is considered purely procedural and governs all claims brought in federal court. *Id.* at n. 4. Dodson argues that the amended complaint adding BOKC related back to the original suit under Rule 15(c).

> "Federal Rule of Civil Procedure 15(c) is a procedural provision to allow a party to amend an operative pleading despite an applicable statute of limitations in situations where the parties to litigation have been sufficiently put on notice of facts and claims which may give rise to future, related claims. The rationale of the rule is that, once litigation involving a particular transaction has been instituted, the parties should not be protected by a statute of limitations from later asserted claims that arose out of the same conduct set forth in the original pleadings." *Id.* at 1366-67 (footnote and citations omitted).

An amended pleading under Rule 15(c)[15] relates back to the date of the original pleading when the amendment changes the party or the naming of the party against whom a claim is asserted, if, but only if, (1) the claim asserted in the amended pleading arose out of the transaction set forth in the original pleading, (2) the party to be brought in by amendment received sufficient actual notice of the action within 120 days (with some presently irrelevant exceptions) of its institution and will not be prejudiced in maintaining a defense on the merits because of the relation back, and (3) the party to be

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[15] Rule 15(c) was amended, effective December 1, 1991. This amendment made it easier to name additional parties under Rule 15(c). *See* Fed. R. Civ. P. 15 advisory committee note. The parties make no argument that the pre-1991 amendment version of Rule 15(c) should be applied in the instant case. We assume that the post-1991 amendment version of the rule applies. If the claim against BOKC does not relate back under the later, more permissive version of the rule, then it also would not relate back under the older version of the rule.

brought in by amendment knew or should have known that but for a mistake concerning the identity of the proper party, the action would have been brought against the party. *See* Fed. R. Civ. P. 15. While BOKC had the burden on summary judgment of presenting evidence sufficient to prove its statute of limitations defense, Dodson had the burden of proof to rebut the statute of limitations grounds by relation back under Rule 15(c). *See Crescent Towing & Salvage Co., Inc. v. M/V Anax*, 40 F.3d 741, 744 (5th Cir. 1994) (party who has burden of proof on affirmative defense at trial has burden of proof on summary judgment); *cf. McGregor v. Louisiana State University Bd. of Supervisors*, 3 F.3d 850, 865 (5th Cir. 1993) (plaintiff had burden of proof on summary judgment to present facts supporting equitable estoppel of defendants' statute of limitations defense), *cert. denied*, 114 S.Ct. 1103 (1994).

There is no dispute that the first Rule 15(c) requirement set forth above has been met. BOKC argues that plaintiffs failed to present any evidence that BOKC received notice of the suit within 120 days of the original complaint, or knew or should have known that it would have been named as a party but for a mistake. BOKC also argues that it will be prejudiced by its late addition to the suit because of the vast amount of discovery that has already been taken without any participation by it. Dodson responds that BOKC merged with PKF and that notice to PKF provided notice to BOKC. Dodson relies on two unauthenticated deposition excerpts as evidence of the merger. *Id.* These are not proper summary judgment evidence. *Cf.* Fed. R. Civ. P. 56; *Duplantis v. Shell Offshore, Inc.*, 948 F.2d 187, 191 (5th Cir. 1991) (unsworn letter

giving no indication that affiant is qualified to render an opinion is not summary judgment evidence).

Because Dodson fails to point to any proper evidence that BOKC merged with PKF, he has not met his burden of presenting some evidence that BOKC received notice within the necessary period or that BOKC knew or should have known that it would have been named as a party but for a mistake. Consequently, the statute of limitations continued running on Dodson's claims against BOKC after the initial *Dodson* suit was filed, and his claims against BOKC had expired long before April 8, 1991. For these reasons, we affirm the district court's grant of summary judgment against Dodson on all of his claims against BOKC.

B. The *Lacy* Suit

The district court issued an order purporting to grant defendants' motions to dismiss the *Lacy* complaint under Rule 12(b)(6) on statute of limitations grounds. The appellants and the appellees assume that the district court granted summary judgment, not motions to dismiss. Rule 12(c) permits the district court to treat motions to dismiss as motions for summary judgment if matters outside the pleadings are presented to and not excluded by the court. Fed. R. Civ. P. 12(c); *Darlak v. Bobear*, 814 F.2d 1055, 1064 (5th Cir. 1987). "Only if it appears that the district court *did* rely on matters outside the pleadings should an appellate court treat the dismissal as a summary judgment." *Fernandez-Montes v. Allied Pilots Ass'n*, 987 F.2d 278, 283 (5th Cir. 1993) (emphasis in original). In

Lacy, the district court explicitly relied on its order dismissing *Dodson*, which is a matter outside the pleadings. And the reasoning in the *Dodson* order was based on matters also outside of the pleadings in *Lacy*: the *Wall Street Journal* article, the Hickman letter, the Hillcrest letter, and the fact that some *Dodson* plaintiffs admitted to reading the *Wall Street Journal* article on the day it was published. Thus, we will review the order dismissing *Lacy* as a summary judgment order. *See also* Charles A. Wright & Arthur R. Miller, 5 Federal Practice & Procedure § 1277 (1990) ("[I]n practice, courts that allow the adjudication of affirmative defenses on a motion to dismiss or for judgment on the pleadings are converting these motions into summary judgment motions and normally will give all parties the opportunity provided by Rule 56 to present pertinent evidentiary material to the court.")

While the district court in *Lacy* does appear to have relied on matters outside of the pleadings to grant summary judgment, the court actually raised the statute of limitations defense *sua sponte*. PKF never raised the defense, and Grant raised it by its motions to dismiss[16] only as to plaintiffs' Texas securities law claims. Thus, the district court raised the statute of limitations defense as

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[16] Grant did raise the statute of limitations as to all of plaintiffs' claims in its response in opposition to plaintiffs' motions for leave to file three complaints. Because the magistrate granted plaintiffs' leave to file the complaints, however, plaintiffs had no reason to respond to these arguments. Grant next raised these arguments in its response in opposition to plaintiffs' motion for reconsideration of the district court's dismissal order.

to all of the claims on appeal[17] *sua sponte*. "While this Court generally will not consider an affirmative defense not raised below, we are not prevented from considering the defense where it is raised *sua sponte* by the district court." *Burrell v. Newsome*, 883 F.2d 416, 418 (5th Cir. 1989). When a summary judgment is raised *sua sponte* by the district court, as when a motion to dismiss is converted into a summary judgment motion, the notice and hearing requirements of Rule 56(c) must be met. *Nowlin v. Resolution Trust Corp.*, 33 F.3d 498, 504 (5th Cir. 1994); *Estate of Smith v. Tarrant County Hosp. Dist.*, 691 F.2d 207, 208 (5th Cir. 1982). In the instant case, the district court failed to give ten days notice of its *sua sponte* motion to grant summary judgment on statute of limitations grounds as required by Rule 56(c). *Nowlin*, 33 F.3d at 504; *see* Fed. R. Civ. P. 56(c).

While this Court strictly enforces the notice requirement, we have held that the harmless error doctrine applies to a failure to provide notice under Rule 56(c). *Nowlin*, 33 F.3d at 504 (citation omitted). Thus, if it is established that the additional evidence which the appellants would have provided given proper notice presents no genuine issue of material fact, then the failure to give notice was harmless error. *See id.* The *Lacy* plaintiffs' pleaded in their complaint that they first had knowledge of the facts complained of in the Summer of 1986 and that they exercised due diligence to determine the facts. The *Lacy* suit was filed on June 11, 1990. Summer ends in late September. We cannot say that the *Lacy* record before us

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[17] Appellants do not contest the dismissal of their Texas securities law claims.

adequately establishes the *Nowlin* harmless error exception regarding those claims which have four-year statutes of limitations coupled with the discovery rule. We reverse the district court's order dismissing the *Lacy* plaintiffs' RICO, federal securities law, and Texas common law fraud claims.

The *Lacy* appellants' remaining state law claims, all of which have two-year statutes of limitations, present a more complicated issue. The appellants argue on appeal that the statute of limitations was tolled by the filing of the motion for class certification in *Dodson*. Under Texas law, the filing of a motion for class certification tolls the statute of limitations. *National Ass'n of Government Employees v. City Public Serv. Bd. of San Antonio, Texas*, 40 F.3d 698, 715 n.25 (5th Cir. 1994) (Texas law same as federal); *see Grant v. Austin Bridge Constr. Co.*, 725 S.W.2d 366, 370 (Tex. App. – Houston [14th] 1987, no writ). Once a class is decertified or the motion for certification is denied, the statute begins running again. *See Grant*, 725 S.W.2d at 370; *Calderon v. Presidio Valley Farmers Ass'n*, 863 F.2d 384, 390 (5th Cir.) (federal law), *cert. denied*, 110 S.Ct. 79 (1989). Accordingly, the longest possible time that the statute of limitations was tolled on the *Lacy* plaintiffs' claims was from May 11, 1988 (the time the *Dodson* suit was filed on behalf of a putative class) until October 19, 1989 (the time the motion for class certification was denied).

As noted above, the *Lacy* plaintiffs claim to have discovered facts sufficient to trigger the statute of limitations running in the Summer of 1986, and Summer ends in late September. For purposes of this analysis, we use October 1, 1986 as the date on which the statutes of

limitations commenced to run on the *Lacy* appellants' state claims other than common law fraud. The statutes ran one year, seven months, and ten days, until they were tolled by the *Dodson* suit on May 11, 1988. The statutes began running again on October 19, 1989. The claims expired, at the latest, four months and twenty-one days later on March 12, 1990 – almost three months before the *Lacy* suit was filed. For this reason, we hold that the district court's error in failing to notify the *Lacy* plaintiffs of its intent to raise the statute of limitations as to their state law claims of breach of fiduciary duty, DTPA, and negligence,[18] to all of which the two year statute applies, was harmless error. We affirm the dismissal of the *Lacy* plaintiffs' state law claims, other than that for Texas common law fraud.

IV. PKF's Proffered Alternative Grounds for Dismissal

PKF argues that this Court should affirm the district court's orders of dismissal on several alternative grounds: that plaintiffs in *Lacy* and *Dodson* failed to allege fraud with particularity and that the complaints failed to state a claim on which relief could be granted under various theories not addressed by the district court. In a

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[18] We further note that, the class certification argument is inapplicable to the appellants' negligence cause of action. The last date on which the *Lacy* complaint alleges any wrongful act was committed is in 1984. Thus, the negligence cause of action accrued prior to January 1, 1985, and, because the discovery rule does not apply to the negligence-based claim, it expired prior to January 1, 1987. *See Kansa Reinsurance Co., Ltd.*, 20 F.3d at 1363.

similar case in which we reversed a dismissal on limitations grounds, we twice declined to affirm on the alternative basis that the defendants were entitled to summary judgment on the merits. *See Corwin*, 843 F.2d at 199 n.1; *Corwin v. Marney, Orton Investments*, 788 F.2d 1063, 1069 n.5 (5th Cir. 1986). The contention that the plaintiffs' securities claims failed as a matter of law had been raised below, but this Court held that the issue should be considered by the district court in the first instance. *Corwin*, 843 F.2d at 199 n.1; *Corwin*, 788 F.2d at 1069 n.5. Remand to the district court to consider issues it did not consider previously is especially appropriate when, even if the court finds plaintiffs' claims to be faulty, it is within the district court's discretion to allow the plaintiffs to amend their pleadings. *See* Fed. R. Civ. P. 15(a); *Griggs v. Hinds Junior College*, 563 F.2d 179, 180 (5th Cir. 1977) ("Granting leave to amend is especially appropriate, in cases such as this, when the trial court has dismissed the complaint for failure to state a claim."); *cf. Bueno v. City of Donna*, 714 F.2d 484, 493-94 (5th Cir. 1983) ("It is well-established that there can be no appellate review of allegedly excessive or inadequate damages if the trial court was not given the opportunity to exercise its discretion on a motion for new trial."). Accordingly, we decline PKF's invitation to affirm on alternative grounds of failure to state a claim.

Conclusion

We summarize our disposition as follows:

In *Dodson*: we dismiss the appeal of all appellants except Dodson himself; we affirm the district court's denial of class certification; we affirm the limitations

dismissal of all of Dodson's claims against BOKC and of Dodson's state law claims for breach of fiduciary duty, DPTA and negligence against Grant and PKF; and, we reverse the dismissal of Dodson's RICO, federal securities fraud and Texas common law fraud claims against Grant and PKF and remand such claims for further proceedings not inconsistent herewith.

In *Lacy*: we affirm the district court's dismissal of the *Lacy* plaintiffs' state law claims for breach of fiduciary duty, DPTA and negligence; and we reverse the dismissal of the *Lacy* plaintiffs' RICO, federal securities fraud and Texas common law fraud claims and remand such claims for further proceedings not inconsistent herewith.

DODSON: DISMISSED in part; AFFIRMED in part; REVERSED and REMANDED in part.

LACY: AFFIRMED in part; REVERSED and REMANDED in part.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-2353

RICHARD DODSON, ET AL.,

Plaintiffs-Appellants,

versus

HILLCREST SECURITIES CORP., ET AL.,

Defendants,

ALEXANDER GRANT & CO., ETC.,
PANNELL, KERR & FORSTER,
BRANCH, ORCUTT, KIRKPATRICK & CRISWELL,

Defendants-Appellees.

No. 92-2381

WILLIAM M. and LUCILE C. LACY, ET AL.,

Plaintiffs-Appellants,

versus

HILLCREST SECURITIES CORPORATION, INC., ET AL.,

Defendants,

ALEXANDER GRANT & CO., and
PANNELL, KERR & FORSTER,

Defendants-Appellees.

Appeals from the United States District Court
for the Southern District of Texas

ON PETITION FOR REHEARING

(Filed August 23, 1996)

Before GARWOOD, SMITH and DENNIS, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petitions for rehearing filed in the above cases are DENIED.

ENTERED FOR THE COURT:

/s/ Will Garwood
WILL GARWOOD
UNITED STATES CIRCUIT JUDGE

APPENDIX C

Fed.R.App.P.3 Advisory Committee Notes

1993 Amendment

Note to subdivision (c). The amendment is intended to reduce the amount of satellite litigation spawned by the Supreme Court's decision in Torres v. Oakland Scavenger Co., 487 U.S. 312 (1988). In Torres the Supreme Court held that the language in Rule 3(c) requiring a notice of appeal to "specify the party or parties taking the appeal" is a jurisdictional requirement and that naming the first named party and adding "et al.," without any further specificity is insufficient to identify the appellants. Since the Torres decision, there has been a great deal of litigation regarding whether a notice of appeal that contains some indication of the appellants' identities but does not name the appellants is sufficiently specific.

The amendment states a general rule that specifying the parties should be done by naming them. Naming an appellant in an otherwise timely and proper notice of appeal ensures that the appellant has perfected an appeal. However, in order to prevent the loss of a right to appeal through inadvertent omission of a party's name or continued use of such terms as "et al.," which are sufficient in all district courts filings after the complaint, the amendment allows an attorney representing more than one party the flexibility to indicate which parties are appealing without naming them individually. The test established by the rule for determining whether such designations are sufficient is whether it is objectively clear that a party intended to appeal. A notice of appeal filed by a party proceeding pro se is filed on behalf of the party signing the notice and the signer's spouse and

minor children, if they are parties, unless the notice clearly indicates a contrary intent.

In class actions, naming each member of a class as an appellant may be extraordinarily burdensome or even impossible. In class actions if class certification has been denied, named plaintiffs may appeal the order denying the class certification on their own behalf and on behalf of putative class members, *United States Parole Comm'n v. Geraghty*, 445 U.S. 388 (1980); or if the named plaintiffs choose not to appeal the order denying the class certification, putative class members may appeal, *United Airlines, Inc. v. McDonald*, 432 U.S. 385 (1977). If no class has been certified, naming each of the putative class members as an appellant would often be impossible. Therefore the amendment provides that in class actions, whether or not the class has been certified, it is sufficient for the notice to name one person qualified to bring the appeal as a representative of the class.

Finally, the rule makes it clear that dismissal of an appeal should not occur when it is otherwise clear from the notice that the party intended to appeal. If a court determines it is objectively clear that a party intended to appeal, there are neither administrative concerns nor fairness concerns that should prevent the appeal from going forward.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

RICHARD DODSON, ET AL., Plaintiffs,	§	
VS.	§	C.A. NO. H-88-1639
HILLCREST SECURITIES CORPORATION, INC., HILLCREST EQUITIES, INC., ALEXANDER GRANT & COMPANY (NOW KNOWN AS GRANT THORTON), PANNEL, KERR & FORSTER, AND BRANCH, ORCUTT, KIRKPATRICK & CRISWELL, Defendants.	§	JURY TRIAL DEMANDED (Filed Apr. 29, 1992)

NOTICE OF APPEAL

Judgment was entered for Defendants Alexander Grant & Company and Pannell, Kerr & Forster on April 1, 1992. Judgment was entered for Defendant Branch, Orcutt, Kirkpatrick & Criswell on April 3, 1992. Plaintiffs have filed a Motion to Reconsider these rulings; however, because such a Motion may not extend the time, as provided in Rule 59, for filing Notice Of Appeal, all Plaintiffs file this Notice of their intent to appeal the aforementioned decisions. Appeal is to the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

MANDELL & WRIGHT, P.C.

By: /s/ Sidney Ravkind
Sidney Ravkind
TBA# 16587000
Robert D. Rapp
TBA# 16550900
712 Main, Suite 1600
Houston, TX 77002
713/228-1521

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

This is to certify that on the 29 day of April, 1992 a true and correct copy of the foregoing instrument was sent by certified mail, return receipt requested to:

Mr. Stanley J. Parzen
Mayer, Brown & Platt
190 South LaSalle Street
Chicago, Illinois 60603

Ms. Judith Hession
Mayer, Brown & Platt
3600 NCNB Center
700 Louisiana
Houston, Texas 77002

Mr. William M. Coats
Coats, Rose, Yale, Holm, Ryman & Lee
1001 Fannin, Suite 800
Houston, Texas 77002

Mr. Guy M. Hohmann
Norton & Blair
100 Congress, Suite 310
Austin, Texas 78701

/s/ Sidney Ravkind
Sidney Ravkind

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

RICHARD DODSON, ET AL., Plaintiffs,	§	
VS.	§	C.A. NO. H-88-1639
HILLCREST SECURITIES CORPORATION, INC., HILLCREST EQUITIES, INC., ALEXANDER GRANT & COMPANY (NOW KNOWN AS GRANT THORTON), PANNEL, KERR & FORSTER, AND BRANCH, ORCUTT, KIRKPATRICK & CRISWELL, Defendants.	§	JURY TRIAL DEMANDED (Filed Aug. 17, 1992)

AMENDED NOTICE OF APPEAL

Judgment was entered for Defendants Alexander Grant & Company and Pannell, Kerr & Forster and Branch, Orcutt, Kirkpatrick & Criswell on August 12, 1992. Plaintiffs have filed a Motion to Reconsider these rulings; however, such Motion for Reconsideration was overruled on August 12, 1992. All Plaintiffs file this Notice of their intent to appeal the aforementioned decisions. Appeal is to the United States Court of Appeals for the Fifth Circuit. Plaintiffs have already paid the filing fees.

Respectfully submitted,

MANDELL & WRIGHT, P.C.

By: /s/ Sidney Ravkind
Sidney Ravkind
TBA# 16587000
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Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

This is to certify that on the 17 day of August, 1992 a true and correct copy of the foregoing instrument was sent by certified mail, return receipt requested to:

Mr. Stanley J. Parzen
Mayer, Brown & Platt
190 South LaSalle Street
Chicago, Illinois 60603

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Houston, Texas 77002

Mr. William M. Coats
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Mr. Guy M. Hohmann
Norton & Blair
100 Congress, Suite 310
Austin, Texas 78701

/s/ Sidney Ravkind
Sidney Ravkind

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

WILLIAM M. and LUCILE C. LACY, ET AL., Plaintiffs,	§	C.A. NO. H-90-1864
VS.	§	JURY TRIAL DEMANDED
HILLCREST SECURITIES CORPORATION, INC., ET AL., Defendants.	§	(Filed May 4, 1992)

NOTICE OF APPEAL

Judgment was entered for Defendants Alexander Grant & Company and Pannell, Kerr & Forster on April 24, 1992. Plaintiffs have filed a Motion to Reconsider these rulings; however, because such a Motion may not extend the time, as provided in Rule 59, for filing Notice of Appeal, all Plaintiffs file this Notice of their intent to appeal the aforementioned decisions. Appeal is to the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

MANDELL & WRIGHT, P.C.

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Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

This is to certify that on the 4 day of May, 1992 a true and correct copy of the foregoing instrument was sent by certified mail, return receipt requested to:

Mr. Stanley J. Parzen
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190 South LaSalle Street
Chicago, Illinois 60603

Ms. Judith Hession
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700 Louisiana
Houston, Texas 77002

Mr. Guy M. Hohmann
Norton & Blair
100 Congress, Suite 310
Austin, Texas 78701

/s/ Sidney Ravkind
Sidney Ravkind

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

WILLIAM M. and LUCILE C. LACY, ET AL., Plaintiffs,	§	C.A. NO. H-90-1864
VS.	§	JURY TRIAL DEMANDED
HILLCREST SECURITIES CORPORATION, INC., ET AL., Defendants.	§	(Filed July 10, 1992)

AMENDED NOTICE OF APPEAL

Judgment was entered for Defendants Alexander Grant & Company and Pannell, Kerr & Forster on April 24, 1992. Plaintiffs have filed a Motion to Reconsider these rulings; however, because such a Motion for Reconsideration was overruled on June 30, 1992. All Plaintiffs file this Notice of their intent to appeal the aforementioned decisions. Appeal is to the United States Court of Appeals for the Fifth Circuit. Plaintiffs have already paid the filing fees.

Respectfully submitted,

MANDELL & WRIGHT, P.C.

By: /s/ Sidney Ravkind
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712 Main, Suite 1600
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713/228-1521

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

This is to certify that on the 16 day of July, 1992 a true and correct copy of the foregoing instrument was sent by certified mail, return receipt requested to:

Mr. Stanley J. Parzen
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190 South LaSalle Street
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Ms. Judith Hession
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3600 NCNB Center
700 Louisiana
Houston, Texas 77002

Mr. Guy M. Hohmann
Norton & Blair
100 Congress, Suite 310
Austin, Texas 78701

/s/ Sidney Ravkind
Sidney Ravkind

APPENDIX F

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioners:

1. Joseph Abatie
2. A & D Investments, and its partners:
3. L. Kent Abney
4. Markham A. Dickson
5. Markham A. Dickson, Jr.
6. Claudius M. Dickson
7. N. Ronald Adams
8. Harry Affleck
9. James Agar
10. Mary Anne Ahlstrom
11. Philip Aiello
12. J. B. Alala
13. Deane A. Albright
14. Jack Aldred
15. Albert Alexander
16. Clarence Alexander
17. Paul Allison
18. Harold Almen
19. Ramon Alvarodiaz
20. C. Leon Anderson
21. Harold Anderson
22. John Anderson
23. Kirk Anderson
24. John Andress
25. George Anton
26. Kenneth Appis
27. Gary Armagost
28. Patrick Arnett
29. Ted Ashby
30. Atlee Enterprises, Inc. Atlee Enterprises, Inc. has no parent corporation and no subsidiaries that are not wholly owned.

31. Jerry Avery
32. Ronnie Ayers
33. Preston Bagley
34. Carl Bagwell
35. James Baker
36. Sterling Baker
37. Margaret Baldridge
38. Larry Bales
39. Maury Barksdale
40. Bill Barnett
41. Ida Barnett as Executrix of the Estate of C. H. Barnett, Deceased
42. Claude Barton
43. Randy Bates
44. Gracie Marie Sanchez Baugnon as Testamentary Executrix of the Estate of Richard F. Baugnon, Deceased
45. Chester Beam
46. Ernest Beard
47. Jose Beceiro
48. Jerome Beckes
49. Glen Bell
50. Carol Belton
51. Ben Benedum
52. T. R. Benedum
53. Suzanne Bennison
54. Joseph Benoualid
55. Thomas Benson
56. J. R. Berry and Patricia K. Lawrence
57. Gary Betty
58. John Bicknell
59. James Black
60. BLF Investments and its partners:
61. Paul Lowe
62. Denton Fox
63. Kenny Baker
64. Fred Boecker

65. Mona L. Borchardt, J. Larry Nelson and Edgar Lee Borchardt as Independent Executors of the Estate of Nelson L. Borchardt, Deceased
66. Jack Borger
67. Tim Bothwell
68. Fred Boyd
69. David Bradshaw
70. J. C. Brannan
71. Darrell Brewer
72. Robert Brewer
73. W. Joe Brewer
74. J. Earl Brickhouse
75. Robert Bright
76. Chuck Brooks
77. W. W. Watts III as Independent Executor of the Estate of Leeona Brooks, Deceased
78. Leeona Brooks Trust
79. John Browne
80. Margaret A. Brownfield as Independent Executrix of the Estate of Jerry C. Brownfield, Deceased
81. Mary Kay Bryan
82. W. N. Bryson
83. Thomas Burford
84. William Burt
85. Betty Byram
86. Martin Cadet
87. Jerry Calhoon
88. F. A. Calvert, Jr. Testamentary Trust for the benefit of Hal N. Calvert (Louise N. Calvert and H. K. Calvert, Co-Trustees)
89. Horace Calvert
90. Louise N. Calvert Revocable Trust
91. F. A. Calvert, Jr. Testamentary Trust for the benefit of Melissa T. Calvert (Louise N. Calvert and H. K. Calvert, Co-Trustees)
92. Robert Cameron
93. D. Vernon Camp

94. Frank Camp
95. John Mark Camp
96. E. L. Capps
97. Edward O. Capps
98. William Carlisle
99. Anthony Carrillo
100. Jordan Carroll
101. Wilma West Carson
102. James Carter
103. Med Cashion
104. Howard Cassada
105. David Casto
106. Fred Castrow
107. Horace Chandler
108. Charles Chapman
109. A. B. Cherry
110. J. C. Childers
111. Hoyt Childs
112. Ernesto Ching
113. Leo Chisholm
114. Steve Church
115. Patsy M. Clark as Executrix of the Estate of D. M. Clark, Deceased
116. Edgar Cochrane
117. Philip Coffin
118. Marion Cohenour
119. Ray Cohlmia
120. Eugene Cole
121. Howard Collier
122. Patrick Collins
123. John Colvert
124. Carl Cook
125. Gerald Cooper
126. Jackie Cooper
127. Jackie Cooper Leasing, Inc. Jackie Cooper Leasing, Inc. has no parent corporation and no subsidiaries that are not wholly owned.

128. Jackie Cooper Lincoln-Mercury, Inc. Jackie Cooper Lincoln-Mercury, Inc. has no parent corporation and no subsidiaries that are not wholly owned.
129. Jackie Cooper Oldsmobile-GMC, Inc. Jackie Cooper Oldsmobile-GMC, Inc. has no parent corporation and no subsidiaries that are not wholly owned.
130. Walter Cooper
131. Jeanne Copp
132. Duilio Corigliano
133. Rosalie M. Cotter as Independent Executrix of the Estate of John H. Cotter, Deceased
134. Dan Cotton
135. Edward Cowell
136. Warren Crawford
137. James Crisp
138. Dicksy Jane Waller as Independent Executrix of the Estate of Howard M. Crocker, Deceased
139. John Croley
140. Joseph Croley
141. Gregory Cromer
142. E. Clyde Crouch
143. Charles Crow
144. Donald Crumpler
145. CSR Contracting, Inc. CSR Contracting, Inc. has no parent corporation and no subsidiaries that are not wholly owned.
146. C-Y Enterprises. C-Y Enterprises has no parent corporation and no subsidiaries that are not wholly owned.
147. Claud Cypert
148. Roy Cypert
149. Michel Damiani
150. Marilyn K. Daniel as Executrix of the Estate of Thomas R. Daniel, Deceased
151. Taylor Daniell
152. Don Darling
153. Richard Dart

154. Richard W. Dart
155. Douglas Davis as Executor of the Estate of Dennis D. Davis, Deceased
156. Donald Davis
157. Major Davis
158. Jeannette M. Davis as Executrix of the Estate of Walter B. Davis, Deceased
159. Bobby Dawson
160. George Day
161. George Dehan
162. Deupree Distributing Co., Inc. Deupree Distributing Co., Inc. has no parent corporation and no subsidiaries that are not wholly owned.
163. Joseph Deupree
164. Jerry Dickinson
165. Lawrence Dill
166. Bill Dodgin
167. Edna Dollins
168. W. F. Donahy
169. Jerome Donaldson
170. C. R. Dorsett
171. Thomas Downer
172. Dennis Drzyzga
173. Borden Duffel
174. M. J. Dyke
175. Virginia Early
176. Everett Erlick
177. David Ettinger
178. James Evrage
179. Jack Ewing
180. William Falke
181. Charles Falkenhagen
182. Thomas Falls
183. Michael Fanuzzi
184. Martha Farmer York as Executrix of the Estate of Jimmy D. Farmer, Deceased
185. John Farmer

186. John and Laura Farmer
187. James Feeney
188. William Feeney
189. Edward Ferguson
190. Marvin Fields
191. Alan Fisherman
192. F. J. Fleischer
193. E. P. Fleming
194. Dixie Folzenlogen
195. S. E. Ford
196. J. Edward Foster
197. J. Norman Foster
198. Thomas Foster
199. Edward Fouhy
200. Donald Frank
201. Thomas Franklin
202. Roy Fransen
203. John Frazier
204. Carroll Freeman
205. James French
206. Lloyd Frey
207. Donald Fullmer
208. Denny Gamble
209. Jack Gamble
210. Kevin Gamble
211. Sham Gandhi
212. Gary Garbacz
213. Richard Garrett
214. Bruce Gaylor
215. James Gerace
216. Lawrence Gerdes
217. Shelby Gibbs
218. James Gilbert
219. T. L. Gilley
220. Leonard I. Gillingham Revocable Trust
221. Tom Gillis
222. Gerald Gilmore

223. Janice Gilmore
224. Sidney Gimbel
225. Robert Gold
226. Charles Goldberg
227. Tony Allen Goodman as Permanent Administrator of the Estate of David A. Goodman, Deceased
228. Michael Gorrell
229. Robert Goyette
230. Gary Grant
231. Michael Grasley
232. John Greco
233. Burle Green
234. Howard Green
235. Gregory Gregg
236. Don Gregory
237. H. D. Griffith
238. John Griffith
239. Gerald Grogin
240. Kenneth Gruber
241. Roy Gurley
242. William Guzzetti
243. Jay Hale
244. William Hale
245. Sylvia Hall
246. Cloyce Hallman
247. James Hallman
248. James P. Hamilton
249. Thomas & Isobel Hanover
250. L. C. Hansen
251. Leonard Hansen
252. Eugene Hansmeyer
253. Shirley Hanson
254. Floyd Hardimon
255. Ronald Harlan
256. W. E. Harlan
257. Glenn Harris

258. Patricia A. Harris as Administratrix of the Estate of James C. Harris, Deceased
259. M. Lee Harris
260. C. C. Hartley
261. Lowell Hastings
262. Nina Hatton
263. Derrell Havins
264. Joe Helm
265. Peggy Vandivort and Vonda L. Wood as Co-Personal Representatives of the Estate of Helen Helt, Deceased
266. H. B. Henderson
267. M. Ray Hennig
268. Ronald Henze
269. Mack Hickman, Pro Se
270. Morris Hickman
271. Laurie Hicks
272. Mike Higgins
273. W. Robert Hightower
274. Harvard Hill
275. Jerry Hill
276. James Hindman
277. William Hinkle
278. W. K. Hoffman
279. William Hogan
280. Stewart Hoge
281. Richard Holcomb
282. Dixon Holland
283. Gary Hood
284. Winfrey Horton
285. George Huber
286. Gary Huckabay
287. Elizabeth Hudson
288. John Hudson
289. N. Don Hudson
290. Gene Hunt
291. James Hunt

292. Ralph Hunt
293. Richard Hutto
294. David Ihnen
295. John Ikard
296. Phill Ingram
297. J & B Investment Company and its partners:
298. James Richard
299. Barbara Richard
300. B. H. Jackson
301. Jerry Jackson
302. Frank Jacob
303. Niel Jasperson
304. Judith Johnson
305. James Johnstone
306. Richard Johnstone
307. Edwin Jones
308. Ken Jones
309. Lewis Jones
310. Richard Jones
311. W. F. Jones
312. Edward Jungles
313. Joseph Kannan
314. Thomas Kapusta
315. Jack Kassahn
316. Daniel Kelly
317. John Kendall
318. K Enterprises and one of its partners:
319. Alex S. Kiriakides, Jr.
320. Gary Kent
321. Joe Kercheville
322. Larry Killebrew
323. Robert H. King
324. Robert W. King
325. Barbara Klein
326. Ira Klein
327. H. W. Koenig
328. Martin Koslin

329. Arun Kothari
330. Joshua Kruger
331. Kuykendall Enterprises. Kuykendall Enterprises has no parent corporation and no subsidiaries that are not wholly owned.
332. Johnny Lacy
333. Ronald Lacy
334. David Laird
335. Kathleen Lander
336. James Langston
337. Robert Lansford
338. Jess Latham, Jr.
339. Jess B. Latham, Jr. as Executor of the Estate of Jess B. Latham, Sr., Deceased
340. Jess Ben Latham, III
341. Richard Lauby
342. Michael Lawlor
343. Lynn Leany
344. Glenn Lee
345. S. Whitfield Lee
346. Richard Leger
347. Thomas Leger Trust No. 1 and its partners:
348. Thomas Leger
349. John Lovelace
350. George Truitt
351. Ronnie Letcher
352. Levelland Compress Co., Inc. Levelland Compress Co., Inc. has no parent corporation and no subsidiaries that are not wholly owned.
353. Johnie Lewis
354. J. H. Liem
355. Don Lindsay
356. Lavinia Lisbony
357. Stephen Loebl
358. Frank Loop
359. Anatole Lorraine
360. John Lowry

361. J. R. Loy
362. James Lucas
363. Gary Mabie
364. William Mabry and Barbara Salvo
365. Brendan Macken
366. Bill Maddox
367. James Main
368. Don Mallet
369. Mary Katherine Mangelsdorf as Independent Executrix of the Estate of John W. Mangelsdorf, Deceased
370. John Mansen
371. Glenn Marcus
372. John Marik
373. Edward Marron
374. George Martin
375. John Martin
376. Louis Martin
377. John Massey
378. Donald Masters
379. Linda May Hall as Independent Executrix of the Estate of Richard C. May, Deceased
380. Ron May
381. Brian McAlary
382. Bonnie McAteer as Executrix of the Estate of Robert J. McAteer, Deceased
383. McBrides Guns, Inc. McBrides Guns, Inc. has no parent corporation and no subsidiaries that are not wholly owned.
384. Jolene Zummo McCartney
385. E. Leon McCasland
386. Larry McClain
387. James McCoy, Jr.
388. Earl McDonald
389. Mike McDonald
390. Priscilla V. McEldowney
391. Philip A. McKinney

392. James McKinnon
393. Hobart McMordie
394. John McPherren
395. Francisco Medina
396. William Mefford
397. Joe Mendelovitz
398. Mark Mendelovitz
399. A. C. Meyer
400. Edmond Meyer
401. Stewart Meyer
402. MHF Investments Partnership and its partners:
403. Gregory B. Mobley
404. Gladys K. Mobley as Executrix of the Estate of O. B. Mobley, Jr., Deceased
405. Penelope Mobley Conley
406. Ann D. Harmon
407. V. J. Fulco
408. Joseph Miller
409. Milton Miller
410. Ned Miller
411. Ralph C. Mills as Independent Administrator of the Estate of Mary A. Mills, Deceased
412. Ralph Mills
413. Robert Mims
414. Harold Mitchell
415. Preston Mitchell
416. George Morehead
417. Morehead Foods Distributing Co., Inc. Morehead Foods Distributing Co., Inc. has no parent corporation and no subsidiaries that are not wholly owned.
418. Gerald Morris
419. John Morris
420. Robert Mortensen
421. James Mott
422. George Mountcastle
423. Mud Trans, Inc. and its partners:
424. Bert Hutson

425. Sue Hutson
426. Edwin Murphy
427. John Murray
428. Charles Murrow
429. Jim Muse
430. Gary Myers
431. S. Lee Napier
432. Kurt Nauck
433. David Nethery
434. Freidrich Neumann
435. Max Newland
436. Don Nickels
437. E. W. Nickels
438. Olga Nimtz
439. Jack Nolingberg
440. David Northcutt
441. Kent Nowlin
442. Larry Oliver
443. Harry Ollinger
444. Phillip Oppedahl
445. Harold Gray Osborn, Jr., Rosemary Osborn Gibbs and Sarah Osborn Hewitt as Surviving Heirs of the Estate of Rosemary M. Osborn, Deceased
446. Virendra Oza
447. J. A. Pallone
448. Allan Panzer
449. I. D. Panzer
450. Paris Petroleum Corporation. Paris Petroleum Corporation has no parent corporation and no subsidiaries that are not wholly owned.
451. Charles Parks
452. Chris Parks
453. Shirrell Parks
454. Alice Hix Parsley as Independent Executrix of the Estate of Bill J. Parsley, Deceased
455. J. F. Paulk
456. H. J. Pearce

457. C. Stanley Peikin
458. William Pendleton
459. Leon Penn
460. Price Perrill
461. Fred Phillips
462. Rodney Phillips
463. Margaret Zummo Pigg
464. Harry Plackemeier
465. Donald Pomerantz
466. Melvin Pomerantz
467. Pool & Thompson Investments and its partners:
468. Ted N. Pool
469. Robert C. Thompson
470. Positive Air, Inc. Positive Air, Inc. has no parent corporation and no subsidiaries that are not wholly owned.
471. Joe Powell
472. Lloyd Price
473. Thomas Price
474. Harvie Pruitt
475. Nathan Pryzant
476. Robert Raitz
477. Deloy Randolph
478. Glenn Randolph
479. Isabel Ann Rapier as Independent Executrix of the Estate of Robert E. Rapier, Deceased
480. Mort Raskin
481. Bill Read
482. Royse Reagan
483. Derrill Reeves
484. Doris Reeves
485. Mildred Reeves
486. Ronald Reid
487. Parks Reinhardt
488. Lawrence Renth
48º. Cesar Reyes

490. Susan A. Rice and Barry Thomas Rice as Co-Personal Representatives of the Estate of Robert T. Rice, Deceased
491. Elizabeth Richerson
492. Edmund Richter
493. James Riddell
494. Frank Rieber
495. Claude Riley
496. Michael Riley
497. Jules Ringer
498. Horace Robbins
499. M. R. Roberts
500. Paul Roberts
501. John Robertson
502. James Robins
503. William Rogers
504. Paul Roitsch
505. Jerry Rose
506. Lewis & Linda Rosen
507. Ronald Rosser
508. William Rowell
509. Milton Rowley
510. Gordon Runyon
511. Henry Russell
512. Robert Russo
513. Frank Ryburn
514. Fred Saied
515. Charles Salley
516. Joe Sawyer
517. Charles Saxe
518. James Schad
519. Horst Schmidt
520. Frank Schneider
521. Vernon Schoemaker
522. John Schoonover
523. Jack Schwab
524. Billy Schwake

525. Adolph Schwartz
526. Charles Severs
527. Shady Nook Auto Parts, Inc. Shady Nook Auto Parts, Inc. has no parent corporation and no subsidiaries that are not wholly owned.
528. Roy Sheffield
529. Eugene Sherman
530. Anil Sheth
531. M. F. Shoukfeh
532. H. Earl Shriver
533. Allan Shulkin
534. George Sides
535. John Sims
536. Michael Sirdofsky
537. B. J. Sitzes
538. Denise Skinner and A. J. Reed as Co-Executors of the Estate of Mary J. (Jackie) Skinner, Deceased
539. William Skinner
540. Don Slatton
541. Carl Smith
542. Donald Smith
543. Richard Smith
544. William Smith
545. William Solomon
546. Patricia Spelts
547. John Spence
548. William Spitz
549. James Stammer
550. Robert Standley
551. John Stark
552. Robert Steele
553. Fritz Stelljes
554. Joe Stockton
555. Josephine Stout
556. Fred Stow
557. Stowaway Trust
558. William Strain

559. Horst Stratmann
560. Luis Subieta
561. Collis Suderman
562. Stephen Suttle
563. Shirlene B. Swan as Personal Representative of the Estate of Roger H. Swan, Deceased
564. L. Jack Swink
565. Walter Talley
566. Don Tapper
567. William Taylor
568. Thomas Family Partners
569. Malcolm Thomas
570. Bueal Lee Thompson
571. C. Odell Thompson
572. Genne M. Thornton as Independent Executrix of the Estate of Herbert D. Thornton, Deceased
573. John Tobin
574. Joseph Tobin
575. Douglas Tomlin
576. David Tompkins, Pro Se
577. Donald Tucker
578. Donald F. Tucker
579. George Tucker
580. John Traylor
581. Theron U. Collins as one of the Co-Executors of the Estate of Katherine C. Tyler, Deceased
582. Frank Valega
583. Lewis Vallette
584. Stephen Vallone
585. Peggy Vandivort
586. Jess Vanhooser
587. Surendra Varma
588. Elizabeth Vinson
589. Barbara Brill Voight as Independent Executrix of the Estate of William W. Voight, Deceased
590. Georgia Voorhees
591. Hazel Voorhees

592. David Waddell
593. Ricardo Wade
594. J. C. Walker
595. Dennis Wall
596. James Wallace
597. John Wallace
598. Lenwood Wallace
599. Buddy B. Baldridge as one of the Independent Co-Executors of the Estate of Mary B. Wallace, Deceased
600. Luther Waller
601. Robert Wallis
602. Donald A. Buckner as Executor of the Estate of Maurice J. Walsh, Deceased
603. Melvin Ward
604. William Ward
605. Patrick Wardlaw
606. Joe Washington
607. Robert Watlington
608. Gary Watson
609. W. W. Watts
610. Mack Wetmore
611. Robert Wey
612. Stephen Whisenant
613. Douglas Whistler
614. David White
615. John White
616. G. F. Whitlow
617. Floyd Whitley
618. Stephen Whitney
619. Henry Wilde
620. Jerome Wilkenfeld
621. Clifford Williams
622. Don Williams
623. Glen Willis
624. Henry Willoughby
625. Steve Wilsey

626. Douglas Wilson
627. Roy Wilson
628. Herschel Witherspoon
629. Scotty Witt
630. Alvin Witten
631. Robert Wolf
632. Peter Wood
633. Rhame Wood
634. Terry and Vonda Wood
635. John Woody
636. John Word
637. Benjamin Wyche
638. Herbert Yarborough
639. George Young
640. George Young Sales Co., Inc. George Young Sales Co., Inc. has no parent corporation and no subsidiaries that are not wholly owned.
641. Frank Zummo
642. Greg Zummo
643. Pete Zummo
644. Roy Zummo

Respondents:

1. Grant Thornton L.L.P. During the pendency of the proceedings below, Alexander Grant & Company, an original respondent, became Grant Thornton L.L.P.
2. Pannell, Kerr & Forster
3. Branch, Orcutt, Kirkpatrick & Criswell